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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LIX.

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AMERICAN STATE REPORTS.

VOL. LIX.

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AMERICAN STATE REPORTS.

VOL LIX

CASES
IN THE
SUPREME COURT
OF
TEXAS.

HOUSTON DIRECT NAVIGATION COMPANY v. INSURANCE COMPANY OF NORTH AMERICA.

[89 TEXAS, 1.]

INTERSTATE COMMERCE, WHEN COMMENCES.—When a commodity is delivered to a carrier to be transported on a continuous voyage or trip to a point beyond the state, the character of interstate commerce attaches thereto.

CARRIERS—INTERSTATE COMMERCE—CONNECTING CARRIERS.—If goods are delivered to a carrier for shipment to a point beyond the state, and he enters upon the duty of carriage, they are thereby brought within the law of interstate commerce, though he is but one of several carriers by whom the whole carriage is to be effected, and he is to deliver the goods to another carrier before they leave the state, and he has restricted his liability so as not to be answerable for the act or negligence of any connecting carrier.

INTERSTATE COMMERCE—LIABILITY OF CARRIERS, BY WHAT LAW CONTROLLED.—If a carrier is engaged in interstate and foreign commerce, its liability for the loss of goods in its custody as such must be determined by the rules established by Congress, although it is a corporation, and its charter declares that it shall be subject in the transportation of freight to the laws applicable to common carriers.

CARRIERS—INTERSTATE COMMERCE, RIGHT TO LIMIT LIABILITY.—By the laws of Congress a carrier engaged in interstate or foreign commerce may, by contract, limit its liability in cases where it is not shown to have been guilty of negligence, and such limitation is effective, though by the state laws it is not permissible.

Mott & Armstrong, for the plaintiff in error.

Hume & Kleberg, for the defendant in error.

* **BROWN, A. J.** The Insurance Company of North America sued the Direct Navigation Company to recover damage done to and the value of cotton destroyed by fire while in the

possession of the navigation company—the insurance company having paid the loss to the owners of the cotton, which had been shipped from Houston on a barge belonging to the navigation company, and insured for the owners by the Insurance Company of North America. The insurance company claimed to be subrogated to the rights of the owners. The navigation company pleaded a general denial, and by special answer to the effect that the fire “was not due to its negligence, nor to its design or neglect”; that the shipment was an interstate shipment, and that the contracts for the transportation of the cotton were maritime contracts concerning the transportation of freight upon the navigable waters of the United States connecting with the high seas; that the barge Katinka was duly enrolled and licensed under the laws of the United States for engaging in such commerce; that the loss was occasioned by fire not due to its negligence. There was a trial before the court without a jury, and judgment rendered for the plaintiff, which judgment was affirmed by the court of civil appeals. The facts are as follows:

The Direct Navigation Company is a corporation created by special act of the legislature of the state of Texas, approved October 9, 1866, which act contains, among others, the following provision:

“Sec. 10. That the company shall, within six months after the passage of this charter through the legislature, have on the waters of ⁵ Buffalo bayou and Galveston bay and harbor a sufficient number of steamers, barges, and propellers to meet the demands of commerce upon said company, and they shall be subject in the transportation of freight to the laws applicable to common carriers.”

The navigation company was organized under this act, and ever since has operated under it and under license from the United States, running and navigating steamers, barges, and propellers upon the waters of Buffalo bayou and Galveston bay, between the city of Houston and the city of Galveston, and to sea-going vessels, for the purpose of transporting freight. During the month of September, 1892, it owned and operated upon said waters the barge Katinka. On the 15th of September, 1892, the company received, at Houston, Texas, one hundred and eighty-four bales of cotton, and on the 16th of the same month it received, at Houston, one hundred and fifty-four bales of cotton, giving bills of lading therefor. The bills of lading recited that the cotton was received by the Houston Direct Navigation Company, in apparent good order and well conditioned, of Zeig-

ler & McIlhenny for delivery to order, notify John Sherwood & Co. and O. Hayworth, respectively, or their assigns, at Galveston, he or they paying freight and charges, as per margin. The freight and charges were paid at Houston. The bills of lading further provided, as follows: "It is understood and expressly stipulated that the liability of the Houston Direct Navigation Company shall cease upon delivery to the next connecting line, and that the said Houston Direct Navigation Company and its connections, which receive and transport the said property, shall not be liable for loss by fire. . . . The cotton under this bill of lading . . . is to be transported to the depots, or the landings of the steamboats of forwarding lines at the points receipted to, for delivery. It is further agreed that, in case of any loss or damage, that company alone shall be answerable therefor in whose actual custody the same may be at the time of the happening of such loss. This contract is executed and accomplished, and the liability of the Houston Direct Navigation Company terminates on the delivery of the cotton to the Mallory Line at Galveston, when the liability of the said Mallory Line commences, and not before."

The cotton shipped to order, notify John Sherwood & Co., was the property of John Sherwood & Co., who resided in Liverpool; and the cotton shipped to order, notify O. Hayworth, was the property of C. Menelas, who was a foreign buyer. When the cotton was delivered to the Direct Navigation Company, it was started on its trip to New York and Liverpool, to be transported by the defendant, the navigation company, to Galveston, there delivered to the Mallory Line, which was to transport it to New York, to be there delivered to a connecting line, and thence transported to Liverpool. The bill of lading given by the navigation company was only to Galveston, and then the remainder of the cotton, not destroyed, was delivered to the Mallory Line, which gave another bill of lading.

On the nineteenth day of September, 1892, after one hundred and seventy-two bales of the cotton had ⁶ been unloaded from the barge Katinka, at one of the wharves at Galveston, a fire broke out in the balance of the cargo yet on board the barge, destroying a part thereof and damaging the balance. The insurance company, under the terms of its policy, took the damaged cotton and paid the full amount of the insurance on the cotton so burned, amounting in the aggregate to the sum of six thousand seven hundred and twenty-nine dollars and thirty-three cents. It sold the damaged cotton in open market to the high-

est bidder, sustaining a loss of sixteen hundred and forty-three dollars and seventy-eight cents, being the value of the cotton burned and the difference between the value of the damaged cotton before it was damaged and the amount realized from the sale.

The trial court found that the origin of the fire was unknown, but it expressly declined to determine whether the fire originated from the negligence of the navigation company or not.

Under a number of assignments practically two questions are presented in this case, which may be stated as follows: 1. Was the Direct Navigation Company engaged in interstate commerce while transporting the cotton in question from Houston to Galveston? If so, then 2. Did the provision in its charter that it should "be subject in the transportation of freight to the laws applicable to common carriers," operate to make it liable under the laws of the state for the loss sustained, notwithstanding the limitation contained in the bill of lading and the exemption provided by the statutes of the United States?

No distinct and certain definition of interstate commerce has yet been fixed by the decisions of the courts, and perhaps none can be given which will apply to all cases. But the law as applicable to this case, deducible from the decisions of the courts, may be stated thus: When a commodity has been delivered to a common carrier, to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches thereto: *Coe v. Erroll*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 557; *Ex parte Koehler*, 30 Fed. Rep. 867; *In re Greene*, 52 Fed Rep. 113; *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 125.

In *Coe v. Erroll*, 116 U. S. 517, the question to be determined was whether or not the property in question was subject to taxation in the state where it then was, and this question depended upon whether or not it had become an element of interstate commerce. The court said: "But no distinct rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state, will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for trans-

portation to another state, or have been started upon such transportation in a continuous route or ⁷ journey. We think that this must be the true rule on the subject. . . . And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true it was said in the case of *The Daniel Ball*, 10 Wall. 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

The questions to be determined are: Did the cotton in question when delivered to the navigation company start on its journey to a point outside of the state of Texas? Was its destination at that time fixed and determined upon, and was the carriage from Houston to Galveston a part of the voyage which was to be continuous? The facts of this case show that the owners of the cotton lived in Liverpool, and the cotton itself was, by their agents, put in transportation by delivery to the navigation company, to be carried by it to the city of Galveston, and there delivered to the Mallory Line, by which it was to be transported to New York, and thence by connecting line of steamers to the city of Liverpool. The bill of lading upon its face showed that the navigation company was to deliver the cotton to the Mallory Line at Galveston, at which time the liability of the navigation company should cease and that of the Mallory Line should attach. There can be no doubt that the destination of the cotton at the time of its delivery to the navigation company was fixed

and determined, and the point at which it was destined for final delivery was beyond the limits of this state. It is equally clear from the bill of lading and other testimony that a continuous voyage was contemplated, and the trip between Houston and Galveston was simply a part of that voyage. Upon this state of facts the cotton would undoubtedly come within the rule laid down in the case cited above, and would be classed as interstate commerce.

But the evidence likewise shows that the Houston Direct Navigation Company gave a bill of lading to Galveston only and not a through bill ^s to cover the entire route, and the charges for freight to Galveston and wharfage at that place were paid at the time that the cotton was delivered. Do these facts change the rule of law applicable to the case and constitute this a local shipment, as distinguished from interstate or foreign commerce?

It has been generally held that where a carrier in one state receives a commodity for shipment by a continuous trip over its own line and connecting lines, giving a through bill of lading to the point of destination, with the provision that its own liability shall cease upon delivery to its connecting line, at a point within the state where it was received, such transportation is to be considered as interstate commerce, and the carrier is but one of several agencies employed: *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 135. The fact that the bill of lading given by the Direct Navigation Company was only to Galveston establishes simply that the liability of the company terminated at that point, and has the same effect, and no more, as if a through bill had been given by the receiving carrier, with the stipulation that its liability should terminate when delivered to the connecting carrier. The effect of such bill of lading as last named would be to make it, although a through bill upon its face, in effect a separate bill, so far as the liability is concerned of each carrier engaged in the transportation.

We do not understand that it is necessary that all of the carriers engaged in an interstate or foreign shipment shall be parties to the contract of shipment for the entire route. In fact, as we understand the decisions, the character of the commerce is not affected by the terms of the contract of the carrier as it relates to liability for the freight, but only in so far as it shows that it is or is not a part of the continuous carriage from the beginning point to the point of destination: *The Daniel Ball*, 10 Wall. 565; *Harmon v. Chicago*, 140 Ill. 374; *Foster v. Davenport*, 22 How. 244. The last two cases cited involved the ques-

tion as to whether or not tugboats, engaged in towing vessels which were themselves engaged in interstate commerce, were to be considered as likewise engaged in such commerce. In each case it was held that such tugboats, although operating locally and within the limits of a state, were to be considered as engaged in interstate commerce, and not subject to the laws of the state. The tugboats were in no sense parties to the contracts for transportation, but were simply agencies employed therein.

In *Heiserman v. Burlington etc. Ry. Co.*, 63 Iowa, 732, the supreme court of that state, upon a bill of lading similar to the one given in this case, held that the transaction constituted a local shipment, and that the rights of the parties were to be determined by the laws of that state. In *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 135, the judge who delivered that opinion approved the case of *Heiserman v. Burlington etc. Ry. Co.*, 63 Iowa, 732, but the question decided in the case approved and now before this court was not embraced in the case then being decided, and the expressions of approval of the Iowa case are simply obiter dicta and not to be taken ⁹ as authority. The court of civil appeals and the counsel for defendant in error refer to the case of *Rio Grande Ry. Co. v. Cross*, 5 Tex. Civ. App. 454, in which this court refused an application for a writ of error. In that case the court of civil appeals said: "The evidence does not show that the shipment of the money was interstate, but, if it did, the limitation of liability by the steamship company in its bill of lading applies only to carriage by the ship." The two propositions were involved in the decision of that case, and this court refused the application for writ of error upon the ground that the limitation of liability by the steamship company in the bill of lading given by it did not apply to the carriage by the railway company. The refusal of a writ of error does not imply the approval of the decision of the court of civil appeals upon all questions discussed by it, but simply of the result of the judgment of that court.

We conclude from the authorities and the facts in this case that the transportation of the cotton by the Direct Navigation Company from Houston to Galveston was interstate or foreign commerce, and that its liability for the loss must be determined by the rules of law established by Congress, in so far as such rules have been prescribed, unless the provision of the charter, before quoted, operates to subject the corporation in the carriage of interstate commerce to the statutes of the state instead of the laws of Congress.

We believe that the proper construction of the language used in the charter of the navigation company is simply to express as matter of law that it is to be regarded as a common carrier, and as such subject to whatever law may be applicable to a common carrier in the business in which it may be engaged. The effect of this statutory declaration is to relieve persons who may have claims against it of the necessity of establishing its character as a common carrier, and to make it liable as such for all losses sustained or injuries inflicted in the transaction of its business. It is not necessary, in the view we take of this case, to determine the question of the validity of such a provision in the charter if found to be in conflict with the laws of the United States. We simply hold that the language quoted does not have the effect to make the corporation created by the charter subject to state control, when engaged in interstate commerce, but that, being a common carrier, and so declared by its charter to be, its liability as such is to be determined under the law which may be applicable to the character of commerce in which it may be engaged at the time.

It follows from what we have said that, in our opinion, the liability of the navigation company in this case is to be determined under the laws of Congress upon the subject, or the common law, in so far as Congress has made no provision therefor, and not by the statutes of the state of Texas, which forbid the carrier to limit its liability as at common law.

The trial court expressly declined to pass upon the question of negligence on the part of the navigation company, and the court of civil ¹⁰ appeals made no finding thereon. There was evidence on the part of the carrier tending to show diligence and to negative the idea of negligence on its part, but the evidence is not so conclusive as to justify this court in holding as matter of law that the loss did not occur through the negligence of the navigation company.

We, therefore, cannot enter judgment in this case, but for the errors of the district court and the court of civil appeals, as shown herein, the judgments of both courts are reversed and this cause is remanded to the district court.

INTERSTATE COMMERCE—WHEN COMMENCES.—From the moment that an article of commerce commences to move from one state to another, it becomes a subject of interstate commerce, and, as such, is subject only to national legislation, and not to the police power of the state: *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774; monographic note to *People v. Wemple*, 27 Am. St. Rep. 552. See also, *Norfolk etc. Ry. Co. v. Commonwealth*, 93 Va. 749; 57 Am. St. Rep. 827, and note.

INTERSTATE COMMERCE—LIABILITY OF CARRIERS—JURISDICTION OF ACTIONS.—One who claims damages for a violation of the interstate commerce act cannot maintain his action in a state court, but must bring it either before the interstate commerce commission or a federal court: *Copp v. Louisville etc. R. R. Co.*, 43 La. Ann. 511; 26 Am. St. Rep. 188. See, also, *Davis v. Chicago etc. Ry. Co.*, 93 Wis. 470; 57 Am. St. Rep. 935.

HANOVER FIRE INSURANCE COMPANY v. SHRADER.

[89 TEXAS, 85.]

SUNDAY CANNOT BE EXCLUDED FROM A COMPUTATION OF TIME within which an act may be done, where such time is not short. Hence, if parties are allowed thirty days after the filing of a decision in which to apply for a writ of error, the falling of the last of these days on Sunday does not entitle them to make such application on the following Monday.

SUNDAY.—MINISTERIAL ACTS MAY BE PERFORMED on Sunday, but judicial acts may not. An application for a writ of error may be received and filed on Sunday.

FILING OF A PAPER, WHAT CONSTITUTES.—When a paper is deposited with the clerk of a court for the purpose of making it a part of the record in a cause, it is filed, though the clerk, being doubtful as to his power to then file it, enters upon it the fact and time of its receipt, but does not put his file marks thereon until the next day.

Morgan & Thompson, for the application.

B. P. Eubank, for the motion to dismiss.

GAINES, C. J. Counsel for the respective parties in this case, in response to the request of the court made at a former day of this term, have filed written arguments upon the questions to which their attention was then called, and have materially diminished the labors of the court.

Upon the first question our conclusion is, that Sunday, although the thirtieth day from that on which the motion for a rehearing was overruled by the court of civil appeals, cannot be excluded from the computation. Such is the general rule, although there are some conflicting decisions. It was adopted by this court, after a careful consideration, in *Burr v. Lewis*, 6 Tex. 76; and we have found no case in this court which modifies that decision. Where the time allowed for doing an act is very short, it is usual to exclude a Sunday. The principle would seem to be that, when but a few days are allowed in which to do the act, it is not to be presumed the legislature intended further to abbreviate it, in effect, by including a day ordinarily observed as a day of cessation from all ordinary business. For example,

where two days are designated it is not reasonable to hold that it was the purpose to include a Sunday, when the practical effect of the ruling would be to reduce the time to one day only. But where weeks are included in the time allowed the reason does not apply.

Sunday at common law is *dies non juridicus*: *Swan v. Broome*, 1 W. Black. 496, 526. When the point was first raised in the case cited, Lord Mansfield was evidently in great doubt whether a court could not render a valid judgment upon a Sunday, but, after full consideration, the question was resolved in the negative. That a judgment rendered on that day is void may now be regarded as settled law. It was so held by the court of appeals in *Shearman v. State*, 1 Tex. Ct. App. 215; 28 Am. Rep. 402. ⁴¹ But it was also recognized that, while a judgment could not be pronounced, a verdict might be returned on Sunday: See, also, *Hoghtaling v. Osborne*, 15 Johns. 119. A distinction is made between judicial acts and those of a ministerial character, and it seems to be generally held that in the absence of a statute ministerial acts performed on Sunday are valid. The service of process on Sunday was forbidden by the statute of 29 Charles II, and we think that the English cases which hold the ministerial acts of officers of the court void because performed on Sunday are referable to that act. Expressions of opinions may be found in the books to the effect that the statute was merely declaratory of the common law. Early decisions of the courts of Westminster hold to the contrary: *Mackalley's case*, 9 Coke, 66 b; *Bedoe v. Alpe*, W. Jones, 156; *Swan v. Broome*, 1 W. Black. 496, 526. See, also, *Sayles v. Smith*, 12 Wend. 59; 27 Am. Dec. 117. But we have not found it necessary to determine that question.

In 1846 our legislature provided that "no civil suit shall be instituted, nor shall any process be had on Sundays, except in cases of attachment or sequestration": *Paschell's Digest*, art. 1424. The substance of this provision is found in article 1184 of the Revised Statutes, which reads as follows: "No civil suit shall be commenced, nor shall any process be issued or served on Sunday or any legal holiday, except in cases of injunction, attachment, or sequestration." The prohibition against the filing of a petition (which is the commencement of a suit under our law), and against the issue and service of process, clearly implies that the filing of papers during the progress of the suit was to be allowed: See *Houston etc. Ry. Co. v. Harding*, 63 Tex. 162; *Crabtree v. Whiteselle*, 65 Tex. 111. The statute does not refer to judicial acts, and they are left as at common law. The filing

of an application for a writ of error in the court of civil appeals is the continuation of a suit and not its commencement. In *Bedoe v. Alpe*, W. Jones, 156, cited above, the information was filed on a Sunday, and it was held that the filing was valid. We conclude from these considerations that an application for a writ of error may be lawfully filed on a Sunday; but do not hold that the clerk is bound to do an official act of that character on that day. We think he may lawfully refuse to act when a paper is tendered to him to be placed upon the file; but that if he does act, his act is valid. Sunday being regarded by our people generally as a day of rest, and by many as a day of religious observance, in our opinion, save in exceptional cases, the officers of the court are not required to perform any official functions on such a day, and it is their privilege to refuse their performance should they elect to do so. We may imagine cases in which it may be proper to hold that a ministerial duty, performed on a Sunday, would be voidable if not void—such, for example, as a sale by a sheriff of personal property under judicial process. But should it be so held in regard to such a sale, we think the ruling would rest upon the ground that it would be unjust to the defendant in execution that his property should be sold on a day which is usually devoted to a cessation of business and on which the ⁴² conscientious scruples of many persons would forbid their attendance upon and bidding at the sale: But see *Sayles v. Smith*, 12 Wend. 59; 27 Am. Dec. 117.

It follows from what we have said that we think the file mark put upon the paper on Monday was too late; and it remains, therefore, to consider the effect of the clerk's indorsement as to its receipt upon Sunday. The just inference from the indorsement is, that the application was delivered to the clerk for the purpose of filing it, and that the clerk received it, but, being doubtful as to his power to place it upon the file upon that day, noted the fact and date of its receipt, and marked it filed upon the next day. Where a paper is deposited with the clerk of a court for the purpose of making it a part of the records in the case it is filed. The evidence which is looked to by the court in determining whether the paper has been filed or not is the clerk's indorsement of the fact upon the paper itself. The form of that indorsement is usually the word "filed," with the date. We think, however, if the indorsement shows the fact in other words it is sufficient.

We conclude that the application was lawfully filed on Sunday, and that the clerk's indorsement is evidence of the fact of

its filing, and therefore that we have jurisdiction of the application; but, having examined it, we also conclude that it shows no error, and it is therefore refused.

Writ of error refused.

SUNDAY—TIME—HOW COMPUTED.—In computing the time allowed to do an act, intervening Sundays are included; but, if the day of performance falls on Sunday, it is not counted, and the party is entitled to perform the act on the Monday following: *Salter v. Burt*, 20 Wend. 203; 32 Am. Dec. 530. See extended note to *Cressey v. Parks*, 46 Am. Rep. 415.

SUNDAY—EFFECT ON JUDICIAL PROCEEDINGS.—Sunday is dies non juridicus by common law, and all judicial proceedings which take place on that day where the common-law rule is in force are void: *Parsons v. Lindsay*, 41 Kan. 336; 13 Am. St. Rep. 290, and note; but this rule does not invalidate ministerial acts: *Whipple v. Hill*, 36 Neb. 720; 38 Am. St. Rep. 742, and note.

FILING PAPERS—WHEN COMPLETE.—The placing of a paper in a case as a permanent record in the office of a justice of the peace is a sufficient filing, no matter if he fails to perform the mere clerical act of indorsing it as filed: *Hook v. Fenner*, 18 Colo. 283; 36 Am. St. Rep. 277, and note. See extended note to *Beebe v. Morrell*, 15 Am. St. Rep. 294-298.

MEXICAN NATIONAL RAILWAY COMPANY v. JACKSON.

[89 TEXAS, 107.]

CONFLICT OF LAWS.—THE LIABILITY OF A CARRIER for injuries to its employes, alleged to have resulted from negligence, should be determined by the laws of the country in which the claim originated.

TRANSITORY ACTIONS, WHEN COURT WILL NOT ENTERTAIN FOR CAUSE ARISING IN ANOTHER COUNTRY.—The courts of this state will not undertake to administer rights originating in another state or country under statutes materially different from the laws of this state in relation to the same subject. Hence, our courts will not entertain an action against a foreign railway corporation for injuries resulting to one of its employes in another country during the performance of a contract of service there made, if the laws of such other country are such that our courts must have great difficulty in determining what would be the proper interpretation thereof, and there can be no reasonable certainty that the rights of the parties will be adjudged as they would be if the cause were tried in the courts of the other country.

Action by Jackson, a citizen of Texas, against the Mexican National Railroad Company, a corporation of the Republic of Mexico, whose line of railway extended into Texas. The plaintiff sought to recover for injuries received in Mexico while in the service of the defendant. He obtained a judgment for five thousand dollars, which on appeal to the court of appeals was by it affirmed, and thereupon the defendant prosecuted a writ of error to this court.

Dodd & Mullady, for the plaintiff in error.

E. A. Atlee and Charles C. Pierce, for the defendant in error.

¹⁰⁸ BROWN, A. J. The plaintiff in error is a corporation operating a line of railroad in the Republic of Mexico, which extends into the state of Texas. The defendant in error was in the employ of that railroad company in the Republic of Mexico, and while engaged in the performance of duties as such employé was injured at the station of La Ventura, in the said republic. The injuries received were serious and of a permanent nature. The injury was caused by the negligence of the conductor, who was the vice-principal of the railroad company.

The defendant below, by special plea, set up and pleaded the laws of Mexico in such cases, alleging that the contract of service was entered into in that republic, and the injury occurred within the republic of Mexico; that it was entitled to an adjudication under those laws, which are so dissimilar to the laws of Texas that the courts of this state ought not to undertake to adjudicate them, and that the defendant still owned and operated its line of railroad in Mexico, and was subject to the jurisdiction of the courts of that country.

Proof was made of the laws of Mexico, from which we copy the following articles as being material to the determination of the question involved:

"Art. 72. Congress has power: . . . 22. To enact laws governing general lines of communication, and governing postoffices and mails."

¹⁰⁹ "Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands."

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government."

"Art. 6. There are intentional crimes and crimes resulting from neglect."

"Art. 11. Negligent crimes exist: 1. Where an act is done or a duty omitted which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions."

"3. Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved,

if the accused is ignorant of such circumstances through not having previously made the investigations which the duty of his profession or the importance of the case demands."

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable to make: 1. Restitution; 2. Reparation; 3. Indemnization; and 4. Payment of Judicial Expenses."

"Art. 304. Reparation comprehends the payment of all the damages caused to the injured party, to his family or to a third person, with the violation of a right which is formal, existing, and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable result."

"Art. 305. Indemnization imports the payment of damages, that is, that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing, and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right."

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued, if they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries."

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding, and to avail himself of his rights in such proceeding or in the civil suit."

"Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover."

"Art. 309. The judges who adjudicate upon the civil responsibility ¹¹⁰ shall be controlled by the provisions of this title, in so far as its provisions extend: on other questions they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility."

"Art. 310. The right to civil responsibility forms part of the

estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted."

"Art. 311. The act to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 318, as directly damaged. Consequently, such action forms no part of the estate of the deceased, nor is it extinguished although the latter pardon the offense in life."

"Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed."

"Art. 321. In case of blows or wounds from which the injured party does not remain crippled, lamed, or deformed, he shall have the right that the responsible party pay him all expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which in the opinion of competent persons he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or of a cause which is the immediate effect of such blows or wounds."

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which shall be lucrative and appropriate to his education, habits, social position, and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation."

"Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed, or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed, or deformed."

"Art. 324. The gain which the injured party fails to earn

during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability."

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other ¹¹¹ cases where, in violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work."

"Art. 326. No person shall be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven: that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority."

"Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the acts or omissions of the clerks or servants, causing the liability, shall occur in the service for which they were employed."

"Art. 331. Under the condition of the preceding article those liable are: railroad companies."

"Art. 363. (Limitation.) The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the Civil Code or the Commercial Code, according to the nature of the demand and the subject matter treated of."

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution but for reparation of damages, of indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury."

"Art. 365. A pardon shall in no case extinguish the civil re-

sponsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired."

"Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew."

"Art. 28. Until it is determined in the new Code of Procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: . . . 5. Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but, while the latter is pending, the proceedings in the former shall be stayed."

"Art. 20. When a judicial controversy can be decided neither by the ¹¹² text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all circumstances of the case."

"Art. 21. In case of conflict of rights and the absence of express law for the especial case, the controversy shall be decided in favor of him who seeks to avoid damages and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties."

"Art. 1095. Limitation bars in three years: . . . 8. Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by person or animals, and which the law imposes upon the representatives of such persons or the owners of the animals."

"Art. 1. The executive shall regulate the service of railroads, telegraphs, and telephones constructed, or which in the future may be constructed, upon Mexican territory, according to the following bases: 1. Railroads, telegraphs, and telephones, which in the federal district and territory of Lower California unite together two or more municipalities, or the federal district and territory of Lower California with one or more states, those which communicate two or more states with each other, those which touch any port in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of section 22 of article 72 of the constitution; 2. These general lines of communication and their branches shall be subject exclusively to the federal legislative, executive, and ju-

dicial powers, in their respective spheres, in all cases where any of the following matters are involved: G. Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines; H. Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness, or fault in the service and for accidents or mishaps in the operation."

"Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other."

"Art. 83. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman."

"Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: Three blasts or sounds of the whistle will be the signal that the engine or train is going to move backward."

¹¹³ "Art. 124. Companies (railway) are liable for accidents which occur through the failure to observe the provisions of this chapter (chapter 7) respecting signals, and for employing persons who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals."

"Art. 184. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employés."

"Art. 208. All violations of this law, which companies (railway) commit, shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them."

The trial court rendered judgment for the plaintiff in that court, J. O. Jackson, for the sum of five thousand dollars, from which appeal was taken, and the judgment affirmed by the court of civil appeals. The law of Mexico, under which plaintiff's claim originated, having been pleaded and proved by the defendant, the rights of the parties must be determined by its provisions. "It would be as unjust to apply a different law as it would be to determine the rights of the parties by a different transac-

tion": Story on Conflict of Laws, 38. This is a transitory action and may be maintained in any place where the defendant is found if there be no reason why the court whose jurisdiction is invoked should not entertain the action. The plaintiff, however, has no legal right to have his redress in our courts; nor is it specially a question of comity between this state and the government of Mexico, but one for the courts of this state to decide, as to whether or not the law, by which the right claimed must be determined, is such that we can properly and intelligently administer it, with due regard to the rights of the parties: *Gardner v. Thomas*, 14 Johns. 134; 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543; 13 Am. Dec. 564.

The decisions of this court (well sustained by high authority) establish the doctrine that the courts of this state will not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the law of this state in relation to the same subject: *St. Louis etc. Ry. Co. v. McCormick*, 71 Tex. 660; *Texas etc. Ry. Co. v. Richards*, 68 Tex. 375.

Many difficulties would present themselves in an attempt to determine the meaning of the Mexican law and to apply it in giving redress to the parties claiming rights under it. We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts from which we could ascertain their interpretation of these laws. The language of some of the articles quoted is ambiguous, and we find great difficulty in determining what would be a proper interpretation of the law. We might or might not give the same effect to the language that is given to it in the courts of Mexico. There could be no reasonable certainty that the parties' rights ¹¹⁴ would be adjusted here as they would be if the case were tried in the courts of that country, which is their right, for it is well settled that, if one state undertakes to enforce a law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed. This difficulty of itself furnishes a sufficient reason for the courts of this state to decline to assume jurisdiction of this class of cases.

We will briefly compare some of the provisions of the law of Mexico with the law of this state, showing wherein they differ, and the impracticability of attempting to administer them here. By the Mexican law the plaintiff's right does not rest upon the fact of negligence on the part of the defendant, but such negligence, in order to give a right of action, must be of such char-

acter as to make the act a crime under that law. We must first determine whether the defendant would be subject to a criminal prosecution in Mexico before we can proceed to administer the remedy provided for the wrong. If it is not a crime, no right of action exists, no matter how grossly negligent may be the act which caused the injury. While this is not a criminal prosecution, in the sense that a punishment for the crime is to be inflicted in this suit, it does require a determination of the guilt of the defendant in order to give relief to the plaintiff. In this state, under the facts of this case, no such prosecution could be maintained, nor in any case is the right of recovery made to depend upon the criminality of the act; however, in some cases a recovery cannot be had except upon proof of facts which would show the act to be contrary to a penal statute. The acquittal of the defendant under the Mexican law does not bar the right to recover in a civil proceeding, but the civil action for damages is suspended by the pendency of the criminal prosecution, if such has been commenced, until its final determination. If a suit were pending in a court of this state under that law, and a criminal proceeding should be inaugurated in the courts of Mexico, the court here could not recognize this requirement of the law of that country, and stay the action until the prosecution there had been concluded. We can see no reason for the requirement of the law of Mexico, that the civil proceeding should be stayed during the prosecution of the criminal charge except that the government would thereby secure the presence of the injured party as a witness, and his aid in the punishment of the guilty party. To permit such suits to be maintained in our courts would enable the plaintiffs therein to evade the laws of that country in that particular and would be against the policy of that government. While it is true that this is not a prosecution for the crime as such, nor a suit for a penalty, it is so closely related to that class of proceedings that the courts of this state should not aid in the enforcement of rights arising under those laws which practically require the defendant to be tried for a crime in the civil action.

Under the laws of Mexico, the judge before whom the civil action is commenced is required to induce the parties to adjust their differences and settle their grievance by agreement, if he can do so. This our courts cannot do. If this be regarded as matter of procedure, it is of a character ¹¹⁵ which may involve a substantial benefit to the parties, of which the defendant would

be deprived by permitting the action to be prosecuted in the courts of this state.

If we conclude that the plaintiff is entitled to relief, then we must determine what he has a right to recover, and what protection the defendant is entitled to receive by the judgment of the court under the law proved in this case. By that law the plaintiff would be entitled to recover for all actual damages existing at the time of the trial, and such as must necessarily result therefrom. By our law he would recover for all such damages, and for all such as might probably thereafter result from the injury. Thus under our law, the plaintiff would have a present right to that which he could not recover by the terms of the Mexican law except by subsequent actions therefor. If the plaintiff remain lamed or crippled, disfigured or maimed by the injury, the Mexican law permits the judge to give, in addition to the actual damages, what is termed extraordinary indemnity, in a sum that might be by the judge deemed proper considering the plaintiff's social condition. How could a court in Texas ascertain what this extraordinary indemnity is to be? Is it compensatory or vindictive damages? In this state, a party by reason of social position is not entitled to more or less compensation for such an injury, and our courts could not afford this relief.

The plaintiff would have the right, under the law of that country, by subsequent suits, to recover for any damages that might arise out of the injury after the first judgment was rendered, while in our courts the whole sum must be adjudged in one proceeding. After a judgment in Texas for all damages, existing and prospective, the plaintiff might, in the courts of that country, recover for injuries subsequently developed which might be included in the judgment of the Texas court, and thus a double recovery be had.

Under the laws of Mexico, the defendant would be liable for injuries to plaintiff's family or to third persons growing out of the injury inflicted upon plaintiff. What this might comprehend we do not know; it might include a part of what would be adjudged in the judgment in a Texas court or it might not. At any rate it appears to be a different right to anything known to the laws of Texas, and in favor of persons who could not, under our law, maintain any action for the alleged injury.

If the plaintiff should recover from his injuries, to the extent that he would become able to pursue an occupation suitable to his education and social position, the defendant would have the right under that law to have the payment of damages awarded

for diminished capacity to earn money reduced by the amount that plaintiff could earn in such employment. In this state, no judgment could be rendered which would secure that right, but the judgment must be entered for all probable future losses; hence, the future earnings, no matter how great they might prove to be, could not go to reduce the damages already paid under such judgment as would be rendered in Texas. How this right would be secured in Mexico we cannot see, unless payments were required by the judgment to ¹¹⁶ be made in installments, or that future inability to earn money not being considered upon the first trial, the matter would be settled in subsequent suits to recover for such damages. In any event it is a right of the defendant which no court of this state can secure by its judgment.

There are many points of dissimilarity between the laws of Mexico, as proved in this case, and the law of this state applicable to the same subject, which we have not mentioned, but those noticed are sufficiently numerous and material to show that the courts of Texas should not undertake to adjudicate the rights of parties, arising under those laws, for torts committed in that country; indeed, as we have shown, they could not properly determine the rights of parties arising under those laws. The cases of Texas etc. Ry. Co. v. Richards, 68 Tex. 375, and St. Louis etc. Ry. Co. v. McCormick, 71 Tex. 660, were actions for damages caused by the death of the injured party, but they were decided upon the same principles that apply to this case, that is, that the courts of Texas would not entertain such actions if founded upon a law which is materially different from the law of this state. The cases cited are sustained by the weight of authority, and are conclusive of the question in this state.

There are other sufficient reasons why our courts should not attempt to enforce the Mexican law in cases like this. The reason which influences the courts of one state to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign state or country, is that the defendant, having removed from such other state or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and as matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, because it would be unjust that the wrongdoer should be permitted, by removing from the country where he inflicted the injury, to avoid reparation for the wrong done by him. In this case there has been no removal of the person or property of the defendant. Its railroad remains,

as it was at the time of the injury, within the jurisdiction of the courts of Mexico, and it is liable to suit there according to the laws of that country. The reason for permitting the action to be prosecuted in our courts does not obtain in this case; the plaintiff has voluntarily resorted to the jurisdiction of our courts when his rights could be better adjudicated in Mexico.

The Mexican National Railroad is an important public highway in the Republic of Mexico, by which the commerce of that country is largely carried on with our people. Every judgment for damages rendered against it reduces its revenues, which must of necessity be restored through its charges for transportation of persons and property, and in the main must be paid by that people. It is but just, and perhaps necessary to a proper maintenance of that means of transportation, that the country in which it is operated should determine the charges to be enforced against it. If Texas should open her courts to all persons that may be injured in Mexico in the management of that railroad and others, it may seriously affect the means of commerce between this state and that republic. Thus it becomes ¹¹⁷ a matter of public concern, and a proper subject for our consideration in this connection, in view of the fact that the railroad company is still subject to that jurisdiction. Justice does not demand the exercise of the jurisdiction, and comity between the governments of this state and Mexico would seem to forbid that we should do so: *Gardner v. Thomas*, 14 Johns. 134; 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543; 13 Am. Dec. 564.

There are at this time two systems of railroads extending from the borders of this state into Mexico for several hundred miles each, and as that country shall hereafter develop, and commerce between the two countries become more extended, we may expect other lines to be constructed in the same direction. If our courts assume to adjust the rights of parties against those railroads growing out of such facts, as in this case, we will offer an invitation to all such persons, who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed and the trial by jury secured, to seek the courts of this state to enforce their claims. Thus we would add to the already overburdened condition of our dockets in all the courts, and thereby make the settlement of rights originating outside the state, under the laws of a different government, a charge upon our own people. If the facts showed that this was necessary in order to secure justice, and the laws were such as we could properly enforce, this consideration would have but little weight, but we feel that it is

entitled to be considered where the plaintiff chooses this jurisdiction as a matter of convenience and not of necessity.

We conclude that the district court and the court of civil appeals erred in not dismissing this case under the proof made, for which error the judgments of both of said courts are reversed and this cause is dismissed.

RAILROAD COMPANIES—INJURIES TO EMPLOYEES—CONFLICT OF LAWS.—The law of a state in which a railroad brakeman is injured through the negligence of a fellow-servant determines the right to recover: *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126; 38 Am. St. Rep. 163, and note; *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176; 31 Am. St. Rep. 544, and note.

ACTIONS.—WHEN LOCAL AND WHEN TRANSITORY: See extended note to *Morris v. Missouri Pac. Ry. Co.*, 22 Am. St. Rep. 22-27. A common-law action against a railroad company by an employe to recover for injuries caused by the negligence of the company, is transitory in its nature, and may be maintained in a state other than that in which the injury is received, without proof of the law of the latter state: *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221; 45 Am. St. Rep. 528, and note; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note.

BAHN v. STAROKE.

[89 TEXAS, 203.]

HOMESTEAD.—A DECREE OF DIVORCE WHICH DESTROYS THE FAMILY destroys the homestead right, and if it purports to set aside certain property to the wife as a homestead, there being no children of the marriage, her interest is subject to execution for subsequently contracted debts.

Z. T. Fulmore and Hugh L. Davis, for the appellant.

L. Koeniger, for the appellee.

²⁰⁵ **GAINES, C. J.** The court of civil appeals for the third supreme judicial district have submitted for our decision the following question:

“This is an action by the appellant to recover from appellee two hundred acres of land. Appellee claimed that the land was her homestead. Appellant claimed the land under execution sale against appellee, followed by deed to him, in form, by the sheriff.

“Appellee is the divorced wife of A. Bahn, on the — day of September, 1893, by the district court of Blanco county; the land in suit was the separate estate of her husband, and was their homestead prior to the divorce. In the decree of divorcement

the court set apart to her the land in suit in the following language: "That there be and is set aside the homestead of said Bahn and E. J. Bahn, to her exclusive management and control for and during her natural life, together with all the improvements thereon; said homestead shall be laid off, and is hereby laid off in the following shape to include the buildings thereon, viz.' Then follows a description of the land in suit as the land set apart to Mrs. Bahn during her natural life. Mrs. Bahn took possession of the premises and has occupied the same up to date as her home since November, 1893, and she has at no time owned any other real estate. At her instance her name was changed from Bahn to Starcke, her maiden name. At the time of the divorce and the levy of execution there were and are not any other constituents of the family of A. Bahn and E. J. Bahn entitled to a homestead, no minor children, or other children living with the appellee, and there have been none such since the divorce. She claims the property as her homestead in her own right and under the decree of divorcement. Appellant had a valid judgment against her, rendered after the divorce, to wit, the third day of August, 1894, and the land was regularly sold and deeded to him by the sheriff under execution sale on the judgment.

"Now the question hereby certified to the supreme court is: Was the property subject to forced sale under the circumstances stated, or when the homestead is in a decree of divorcement set aside to the divorced wife, she owning no other real estate, for her own exclusive use during her life, she occupying and continuing to occupy it as a home, is the property protected as her homestead (she having no family), from forced sale in favor of her creditors under judgment and execution against her subsequent to the decree of divorce vesting the estate in her?"

The homestead exemption is declared by the constitution in the following language: "The homestead of a family shall be and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for ²⁰⁶ work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improve-

ments made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the husband alone or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void": Const., art. 16, sec. 50.

Section 52 of the same article reads as follows: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same."

The exemption was declared in the constitution of 1845 and that of 1869 in substantially the same language as that used in section 50 of the present constitution: Const. 1845, art. 7, sec. 22; Const. 1869, art. 12, sec. 15. Neither of the two former made any provision for the disposition of the homestead upon the death of either the husband or wife. At an early day, however, the legislature provided that, upon the death of a husband leaving an insolvent estate, the title to the homestead should vest absolutely in the widow and children, or at least the minor children, of the deceased: Paschal's Digest, art. 1305. The policy shown by that provision has been steadily pursued in all subsequent legislation both ordinary and constitutional: *Zwerne-
mann v. Von Rosenberg*, 76 Tex. 522. Our divorce laws confer no express authority upon the court which grants a divorce to make any disposition whatever of the homestead as such. The provision of the Revised Statutes which authorizes a court granting a decree of divorce to determine the property rights of the parties to the suit, reads as follows:

"The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest himself or herself of the title to real estate": Sayles' Rev. Stats., art. 2864. The present law is the same: Rev. Stats. 1895, art. 2980.

But here it is to be remarked that the point certified for our decision ²⁰⁷ does not suggest that there is any question as to the

validity of so much of the decree of divorce in the original case of Bahn against Bahn as set apart to the wife a life estate in the property in controversy. The simple question for our determination is, Was the property acquired by that decree subject to forced sale for the payment of appellee's debts contracted after her divorce? It is clear that article 2864 of the Revised Statutes does not expressly empower the court to transfer to either party the homestead with the privilege of exemption from execution. The latter is a mere immunity which grows out of the existence of certain conditions, and which is incapable of transfer from one to the other by the act of the parties; and we cannot conclude that it was the purpose of the legislature to authorize the court to make such transfer, in the absence of words in the statute indicative of that intention. We find no such words in the article in question. The divorce destroyed the particular family, the existence of which gave the right of exemptions, and hence destroyed the right of homestead as to that family. Two new families may be created by a divorce dissolving the bonds of matrimony, or they may be created by the subsequent marriage of the parties. Such families would each have a right of exemption, but it proceeds from the existence of the new relation and not from that of the old. It follows, we think, that if there exists any authority for holding that the exemption passed to the wife in this case, it must be found in the sections of the constitution which are hereinbefore quoted. Section 50 exempts "the homestead of a family"; and the general rule is, "no family, no homestead": Waples on Homesteads, 71. Section 52 provides for the event of the dissolution of the family by the death either of the husband or wife, but makes no provision for the case of divorce. In neither, therefore, do we find anything to indicate that any exemption in favor either of a divorced wife or of a divorced husband was intended to be recognized. The words "homestead of a family" have a well-defined meaning, and are not open to a construction which would include the homestead of a single person without a family.

There have been but few cases in this court which bear upon the immediate question. In *Kirkwood v. Domnan*, 80 Tex. 645, 26 Am. St. Rep. 770, the husband and wife resided upon a homestead which was their community property. There was a decree of divorce, which made no disposition of their property rights, but the wife remained upon the homestead with their minor children. The husband sold his interest in the property, and his grantee brought suit for partition. It was held that the pur-

chaser had the right to recover the half interest held by the husband at the time of the divorce and to have a partition, but that the wife's interest, it being her homestead, and she being the head of a family, could not be sold, even to pay the costs of partition decreed against her. In *Zapp v. Strohmeyer*, 75 Tex. 638, the husband and wife were divorced and in the decree the homestead, which was community property, was divided between them. The divorced wife afterward resided upon the part assigned to her with some of the minor children. The ²⁰⁸ husband resided also upon the part set apart to him. A minor son lived a while with him, but had left and was working for himself. The husband's part of the land was levied upon by virtue of an execution for the costs of the divorce suit, and was sold by the sheriff. The court held that the property was exempt from forced sale, and that the purchaser could not recover. The trial judge held that the husband, for the reason that his children might return to his home and he was still liable for their support, was the head of a family. The court in the opinion quote the opinion of the trial judge, seemingly with approval, but it is not clear that it was not intended to hold that the property would have been protected from forced sale if he had had no family. It was, however, as we think, properly held that he was the head of a family, and therefore the expression of opinion upon the other point was not called for by the facts of the case.

The case of *Shoemaker v. Chalfant*, 47 Cal. 432, was very like this, and it was there held that since the family had been severed by the decree of divorce, the portion of the homestead which had been assigned to the husband by the decree, though occupied by him, was subject to execution. It would seem from the opinion that after the divorce the husband had no family—though the facts are meagerly reported.

If in this case the relation of husband and wife between the parties to the divorce suit and their occupancy of the property in controversy—it being the husband's—invested the wife with any kind of an estate in the property, that estate was dependent upon the relation, and terminated when the relation ceased. Her interest as a wife in the homestead, if such it may be called, was destroyed when she ceased to be a wife by a decree of divorce and not by her husband's death. The title she acquired by the decree was an original title, and did not come to her as a homestead. At the very point of time at which she acquired it she became a single woman, and was no longer a constituent of a family. The court had no power to decree her the life estate in the property,

on the ground that it was the homestead of the family, or to devolve upon her a homestead right such as section 52 of article 16 of the constitution devolves upon a surviving wife or husband. It is not clear whether the decree in question attempts to do this or not. The use of the word "homestead" in the decree may have been merely for the purpose of description, and not for the purpose of fixing the quality of the interest or estate in the property. But while it may be that the decree, until set aside or reversed, fixed the rights of the parties, it could not fix the rights of persons who might thereafter become creditors of either. If the court had had the power, and had decreed the wife the property, and had also transferred the homestead right as it existed in the family previous to the divorce, then the case would have resembled in principle more nearly the cases of *Kessler v. Draub*, 52 Tex. 579, 36 Am. Rep. 727, and *Blum v. Gaines*, 57 Tex. 119. In those cases it was held that, where the head of a family, either by the death or dispersion of its members, ceases to have a family, the homestead will remain exempt. ²⁰⁰ They are in accord with the rulings of other courts, but we confess our inability to apprehend clearly the principle upon which they are based. They however settle the law upon the point decided, and we are not disposed to cavil at the conclusion there announced. At the same time, we are unwilling to extend the doctrine to new cases, on account of some supposed analogy between such and the cases just cited.

In short, our conclusion is, that since at the time of the levy and sale the appellee had no family, section 50 of article 16 of the constitution did not exempt the property; that section 52 does not affect the case, because it does not, as to a succession to the homestead right, apply in cases of divorce; and that the court that granted the divorce had no power to transfer the exemption, if it attempted to do so.

Our opinion is, that the property was not exempt from forced sale and it will be so certified.

HOMESTEAD—DECREE OF DIVORCE—EFFECT UPON.—In California, a decree of divorce by which the homestead of the parties is partitioned between them destroys the homestead, and thereafter either spouse may convey his or her interest in the premises without the other joining in the conveyance: Extended note to *Alt v. Banholzer*, 12 Am. St. Rep. 686; *Burkett v. Burkett*, 78 Cal. 310; 12 Am. St. Rep. 58. See, also, *Kirkwood v. Domnan*, 80 Tex. 645; 26 Am. St. Rep. 770, and note.

HAMBEL v. DAVIS.

[89 TEXAS, 256.]

STATUTES, REPEAL OF BY IMPLICATION.—A statute authorizing the service of process by publication in actions before justices of the peace is not repealed by a subsequent statute authorizing the governor to select and designate an official paper in which, within any given district, publication may be made.

JUSTICE OF THE PEACE, PRESUMPTION IN FAVOR OF JURISDICTION.—In a collateral attack upon the judgment of a justice of the peace, the burden must be assumed by the attacking party of showing that the justice did not have jurisdiction of the defendant.

JURISDICTION OF TRANSIENT PERSONS—NONRESIDENTS.—If one who is a permanent resident of a state goes to another and there conducts a business, he may be a transient person within the meaning of the laws of the latter state applicable to such persons, against whom summons may be served by publication.

SUMMONS OR CITATION.—SUFFICIENCY OF DESCRIPTION OF OFFICER AND OF PLACE TO APPEAR.—A citation directed to the sheriff or any constable of C. county, which is ordered to be published in a designated newspaper in that county and commands the defendant "to appear at my office in the town of L.," and which is signed "E. H. Rogan, J. P. C. Co.," is sufficient. From it the defendant must know that he is required to appear at the office of the above-named justice of the peace in the town of C.

M. R. Stringfellow and Walton & Hill, for the application.

237 BROWN, A. J. This application must be refused, because the judgment under which the defendants in error claim title to the land was valid, and by the sale of the land thereunder the title passed from James Kelly to the purchasers at that sale, under whom the defendants in error claim.

It is claimed by the plaintiffs in error that the judgment of the justice of the peace is void, because: 1. The citation for publication, issued in the cause of Levyson v. James Kelly, and in which cause the judgment was rendered under which the land was sold, was issued without authority of law; that is, at that time the law authorizing service of citation by publication in the justice court had been repealed; 2. Because the defendant, at the time the suit was filed and when the judgment was rendered, was a nonresident of the state of Texas; and 3. Because the citation did not name the place at which the defendant was notified to appear.

258 The law of 1870, which authorized service by publication in suits before justices of the peace, was not repealed by the repeal of the law which empowered the governor to select and designate the official paper for that district.

This is a collateral attack upon the judgment of the justice of the peace under which the land was sold, and the burden was

upon the plaintiff below to show that the justice court had no jurisdiction of the defendant in the case of Levyson v. James Kelly. The fact that Kelly claimed to be a resident of Kansas while he was in Caldwell county does not prove that he was not a transient person within the limits of the state of Texas and within the meaning and intent of our statute, subject to be so cited. If his place of permanent residence was in another state, but he was at the time within this state, and a transient person, he might be cited by publication: *Traylor v. Lide* (Tex., Dec. 20, 1887), 7 S. W. Rep. 58. From the facts agreed upon, it appears that Kelly was engaged in business in this state and remained at one place—in Caldwell county—for several months. It does not appear that he left the state before the suit was filed and service perfected. In fact, he is not shown to have been outside of the state for eleven years thereafter. Under this state of facts, the court might have had jurisdiction over him as a transient person within the limits of the state, although his permanent residence might have been in Kansas, and every presumption will be indulged in favor of the validity of the judgment of the court.

Plaintiffs in error contend that the citation for publication in the case of Levyson against Kelly was void because it did not designate the place at which the defendant was cited to appear. The citation was directed to the sheriff or any constable of Caldwell county. It directed that the citation be published in the *News Echo*, a paper published in Caldwell county, and that the defendant be cited "to appear at my office in the town of Lockhart," and was signed "E. H. Rogan, J. P. C. Co." The court knows judicially that Lockhart was the county seat of Caldwell county: *Carson v. Dalton*, 59 Tex. 500. The letters, "J. P. C. Co.," taken in connection with the address of the writ to the officers of Caldwell county, is sufficient to show that Rogan was a justice of the peace of that county: *McDonald v. Morgan*, 27 Tex. 506. It appeared from the citation that the defendant was thereby notified to appear in Lockhart, the county seat of Caldwell county, at the office of E. H. Rogan, justice of the peace. Although Caldwell county was not written after Lockhart, yet it must be known to all persons when the county seat is named that it is located in the particular county of which it is the seat of justice. This citation was sufficient upon which to enter the judgment.

The service of the writ was not sufficient upon which to enter judgment at the July term of the justice court, 1874, but was sufficient upon which to enter such judgment at the next suc-

ceeding term: *Hill v. Baylor*, 23 Tex. 263; *Wilson v. Green*, 1 White & W. C. C., sec. 98.

It is not necessary for us to determine in this case whether the presumption would be indulged (in the absence of proof and in the absence ²⁵⁹ of a recital of service in the judgment rendered) that another citation had been issued and served either by publication or by personal service; that question is not passed upon by this court. It is sufficient that the judgment is valid upon the service shown by the record. The application for writ of error is therefore refused.

STATUTES—REPEAL BY IMPLICATION.—A repeal by implication does not exist unless there is a positive repugnancy between the provisions of the new law and those of the old: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663, and note. See extended note to *Towle v. Marrett*, 14 Am. Dec. 209; note to *Winona v. School Dist. No. 82*, 12 Am. St. Rep. 695.

JUSTICE OF THE PEACE—PRESUMPTION AS TO JURISDICTION.—Ordinarily nothing is presumed in favor of the jurisdiction of a justice of the peace; it must be affirmatively shown: *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688; *McDonald v. Prescott*, 2 Nev. 109; 90 Am. Dec. 517; *Piper v. Pearson*, 2 Gray, 120; 61 Am. Dec. 438, and note. The principal case states the Texas rule: *Heek v. Martin*, 75 Tex. 469; 16 Am. St. Rep. 915, and note.

JURISDICTION OVER NONRESIDENTS WITHIN THE STATE. A right of jurisdiction, whether civil or criminal, will attach to all persons found within the limits of the state or government over which the power of the court extends, whether they be permanent or temporary residents: Monographic note to *Alley v. Caspari*, 6 Am. St. Rep. 181; monographic note to *De la Montanya v. De la Montanya*, 53 Am. St. Rep. 181.

CHASE v. YORK COUNTY SAVINGS BANK,

[89 TEXAS, 316.]

EXECUTION.—TRUST INTERESTS WERE NOT SUBJECT TO EXECUTION at the common law, but interests held in trust for the debtor were made subject to execution by 29 Charles II, sec. 3.

EXECUTION, TRUST INTERESTS WHICH ARE NOT SUBJECT TO.—If several persons unite in purchasing real property and causing it to be conveyed to a trustee for the purpose of vesting him with the absolute title, in order that he may dispose of and convey it without the necessity of anyone else joining in the conveyance, and of accounting for the proceeds arising from such sale the persons thus entitled to an accounting have no such interest in the real property as is subject to execution.

Foster & Wilkinson, for the plaintiffs in error.

I. M. Standifer and Head, Dillard & Morse, for the defendant in error.

²¹⁷ DENMAN, A. J. The agreed case in the record shows that W. P. Rice having furnished fourteen thousand dollars, H. C. Young six thousand dollars, O. D. Baker six thousand dollars, M. H. French six thousand dollars, C. N. Seidlitz three thousand dollars, J. M. Ford six thousand dollars, P. E. Fairbanks six thousand dollars, J. J. Frey two thousand dollars, G. B. Weightman one thousand dollars, J. J. Fairbanks three thousand dollars and P. P. Lang one thousand dollars of the consideration for the purchase of nine tracts of land situated near Denison, Texas, caused the same to be conveyed to said P. E. Fairbanks, trustee, by deeds from various parties; that said land was so conveyed to the said P. E. Fairbanks, trustee, for the purpose and with the intention of vesting in him, the said trustee, the absolute title thereto and in order that the same might be by him disposed of and conveyed without the necessity of the others joining in said conveyances and without intending, in the use of the word "trustee" in the deed made to him, any limitations of the titles to said lands in the said P. E. Fairbanks or his absolute right to sell and convey the same or any part thereof, he to be trustee as between himself and parties furnishing the money "for the purpose only of accounting for the proceeds arising from any sale or sales of said lands or any part thereof"; that in consideration of one dollar paid by said Fairbanks to each of the parties furnishing said consideration they "did severally remise, release, and convey unto him, the said P. E. Fairbanks, and to his successors and assigns forever, all and singular their right, title, and interest in and to said lands and every part thereof, to have and to hold the premises above described, together with all and singular ²¹⁸ the rights and appurtenances thereto in any way belonging unto the said Fairbanks, his successors and assigns"; that it was agreed that as between the parties furnishing the consideration and said Fairbanks, trustee, he "should not be released from his personal obligation to account to each of them and to their assigns for the proceeds of any sale or sales of said lands or any part thereof according to their respective interests in such proceeds"; that thereafter with the consent of all said parties said trustee caused a large portion of said lands to be laid off and platted into lots, blocks, streets, avenues, and alleys, such plats and maps being duly recorded, said lands not being within the corporate limits of the city of Denison, but adjoining, and designated and platted as above stated as an addition thereto, the streets and alleys of said city being extended and duly opened and dedicated through said addition to the public use; that said

trustee, after said subdivision was made, conveyed to different parties portions of said lands, the deeds thereto being duly recorded, but the quantity of lands and the number of purchasers and prices paid are not stated.

The York County Savings Bank caused an attachment to be levied on said lands as the property of French and Rice, who had transferred their respective interests in said trust to other parties, of which transfers the bank had no notice at the time of the levy.

In a proceeding to wind up said trust and divide the proceeds and unsold property among the parties entitled, the bank claimed the interest of French and Rice under said attachment proceedings, and their said transferees claimed same by virtue of said transfers. It is unnecessary to state the circumstances showing how the question arose in the court below, but it will suffice to say that the principal and only question we deem it necessary to determine is whether the respective interests of French and Rice in said trust were subject to levy under a writ of attachment.

The trial court decided the question in the negative and rendered judgment in favor of said transferees, but the court of civil appeals decided it in the affirmative, and reversed the judgment of the trial court, and rendered judgment for the bank. The transferees assign as error here this ruling of the court of civil appeals.

Article 200 of the Revised Statutes of 1895 provides that "the writ of attachment may be levied on such property, and none other, as is or may be by law subject to levy under the writ of execution." In order, therefore, to determine whether the interest of French and Rice in the trust was subject to levy under the attachment, we must ascertain whether it was subject to execution.

That equitable interests were not subject to execution at common law is elementary. In order to enable creditors to subject to the payment of their debts such interests of their debtors in lands as were held by others in trust for them, the statute of 29 Charles II, chapter 3, provided "that it shall be lawful for every sheriff or other officer to whom any writ or precept shall be ³¹⁹ directed, upon any judgment, etc., to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, etc., as any other person or persons shall be seised or possessed in trust for him against whom execution is so issued, etc." In *Doe v. Greenhill*, 4 Barn. & Ald. 684, Abbott, C. J., in construing this statute said: "This statute made a

change in the common law, and, up to a certain extent at least, made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in lands being legally vested in another person, where it is so vested for the benefit of the debtor."

In construing the same statute enacted in New York, Spencer, C. J. (*Bogert v. Perry*, 17 Johns. 351, 8 Am. Dec. 411), said: "It cannot admit of a doubt that the statute embraces those cases only, where the entire estate, out of which the use arises, vests in the cestui que use, in consequence of his having paid the whole consideration money; and I have met with no case or dictum countenancing the doctrine of a divided use, vested in the vendor and vendee," and held that the interest of the vendee in a contract for the sale of land who had paid only a part of the purchase money was not subject to execution.

In *Lynch v. Utica Ins. Co.*, 18 Wend. 236, Lynch devised his estate to executors in trust: 1. To pay debts; 2. To raise sixty thousand dollars and invest same in securities and out of the income thereof to pay his wife an annuity of three thousand dollars and reinvest the surplus; 3. To raise ten thousand dollars to be divided between two persons named; 4. To divide the residue, real and personal, equally between his son, James Lynch, and seven others.

In passing upon the same statute Nelson, C. J., said, "I do not entertain a doubt that the estate of Lynch under the will is an interest that could not have been sold on execution within the statute. It is settled according to several authorities, and one of them in this court, that the statute only extends to clear and simple trusts for the benefit of the debtor: *Bogert v. Perry*, 17 Johns. 351; 8 Am. Dec. 411; *Bogert v. Perry*, 1 Johns. Ch. 52; *Doe v. Greenhill*, 4 Barn. & Ald. 684; *Harris v. Bowker*, 4 Bing. 96. In *Bogert v. Perry*, 17 Johns 351, 8 Am. Dec. 411, Spencer, C. J., said that it was intended to subject to execution the real estate or hereditaments of a person having the entire interest therein, but which was nominally and formally vested in another. The case in *Bingham* is not unlike the present one. There the lands were vested in trustees in trust for the judgment debtor, subject to ten thousand pounds to be raised for another, and which had not yet been raised. The court held that the interest of the cestui que trust was not liable within the statute,

as it was not simply the debtor's, but held jointly with another (the person entitled to the portion of ten thousand pounds)."

In *Bristow v. McCall* (1881), 16 S. C. 545, the testator devised his real estate to executors in trust for his son and daughter, stating: "I hereby direct my executors to divide my lands equally between my son E. and daughter D. and permit each to use, possess, and enjoy his other half ^{and} in severalty during his or her natural life, and after the death of either that they divide the share of each among his or her children equally." The executors divided the land as directed between E. and D., and each went into possession of the share thus allotted. Thereafter E's interest was levied upon and sold under execution. The court held that the purchaser took no title by such sale under a statute similar to the one above quoted, saying: "The trust interest referred to, it is true, is not very distinctly defined in the act, nor is it clearly pointed out in the decisions. But it is concluded that it must be a clear and simple trust and for the benefit of the debtor alone, the object of the statute being merely to remove the technical objection arising from the interest in the land being legally vested in another person, where it is so vested for the benefit of the debtor: *Doe v. Greenhill*, 4 Barn. & Ald. 684; *White v. Kavanagh*, 8 Rich. 395. A simple trust is said by the authorities to be (Lewin on Trusts, 21; Bouvier's Institutes of American Law, 1900) 'a trust corresponding with the ancient use; and it exists where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the letter, is left to the construction of the law.' A trust of this kind, for the benefit of the debtor alone, and not jointly with others, would fall under this section, but, if others were interested, that fact would exclude the application of the statute."

In *Love v. Smathers*, 32 N. C. 369 (1880), A having paid part purchase money for land, gave his note for the balance with B and C as sureties and had the title made to B, who agreed to pay the balance purchase money. It was held that A's interest was not, under a statute similar to the ones above, a pure trust subject to execution, but was mixed with the interest of B, the court saying: "A trust estate of a debtor in land could not be levied on and sold under execution until the act of 1812, nor under that act, if it was to be raised by construction of a court of equity, by reason of fraud, or being an express or implied trust in an honest transaction, unless the debtor, at the time of the sale, was in such situation as to have the legal title decreed

to him if he were to sue for it": See Freeman on Executions, 2d ed., secs. 187, 188; McIlvaine v. Smith, 97 Am. Dec. and note, 303-315.

We have no statute in Texas similar to the ones discussed in the above cases expressly authorizing the sale of trust estates under execution. Our statute in reference to executions, however, does provide that "when a sale has been made and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim which the defendant in execution had in and to the property sold."

In construing this statute in 1854, in the case of Daugherty v. Cox, 13 Tex. 209, this court, through Lipscomb, justice, say: "They insist that, under the broad terms used of interest and claim, an equitable interest would be included. This may be correct in part; it may be that an equitable claim to title or a resulting trust may be sometimes subject to sale by execution, and yet every equity not subject to sale. If, for ²²¹ instance, a purchaser had paid for the land and taken a bond for title, the land would be subject to execution against the purchaser, because there would be nothing uncertain—nothing to be done on the part of the purchaser nor on the part of the vendor, but to make title. If, however, other things were to be done by the parties, as in this case, a selection was to be made out of a particular but large tract, until these things were done there would be no such equity to any particular land as would make it subject to the levy of an execution against the holder of such equity (citing Bogert v. Perry, 17 Johns. 351; 8 Am. Dec. 411). It could not be contended that our statute in the article cited went farther than the statute of 29 Charles II in subjecting equities and trust estates to execution, and perhaps its terms would go as far, but that would not be far enough to subject such an equity as the one claimed to be subject to execution in this case."

In Hendricks v. Snediker, 30 Tex. 307, this court questioned the validity of an execution sale of the equitable interest of a person in lands growing out of a right to specific performance of a voluntary agreement to convey followed by valuable improvements made relying upon such agreement, saying through Moore, C. J.: "Would the equitable rights of the party making improvements under such circumstances be subject to levy and sale under execution? The rights of such a party are more or less indefinite and uncertain until they have been fixed by the

decree of the court. They seem much more in the nature of an uncertain and undetermined claim or demand against the holder of the title to the land, than a title or interest directly in it. If uncertain interests of this sort are subject to sale under execution, evidently they must be made at ruinous sacrifices to debtors, and without effecting the purpose of the law in satisfying the claims of creditors. The position of such party is not like that of one holding under a contract, with specific and definite conditions and stipulations. The right to a decree in each case of this kind must depend on its own peculiar circumstances. An equitable interest in lands may no doubt be the subject of execution sale, but this is not the case in respect to every equitable interest." On the authority of this case a similar sale was held void in *Edwards v. Norton*, 55 Tex. 410.

In *Moser v. Tucker*, 87 Tex. 94, this court, through Stayton, C. J., say: "It is not, however, every interest in property a debtor may have right to or to acquire that may be subjected to sale under execution or otherwise for payment of his debts; for in many instances his right is so remote and contingent that it is deemed more likely to subserve the ends of justice not so to subject it than to take the risk of sacrifice of contingent right by procedure which will most likely be of no practical benefit to the creditor or may be ruinous to the debtor."

Thus we see that this court, being called upon at an early day to determine whether our statute authorized the levy of an execution upon all ³²² equitable interests in land, held in *Daugherty v. Cox*, 13 Tex. 209, that it did not, and that it went no further than the English statute.

This is in accord with the construction placed upon a similar provision elsewhere: *Goodwin v. Anderson*, 5 Smedes & M. 730.

While this court has never undertaken to lay down any general rule by which it might be determined whether a given equity could under the statute be subjected to execution, it is believed that its decisions of the particular cases which have come before it are in harmony with the current of authority elsewhere, unless it be different in allowing of the interest of the purchaser under a contract for sale of land, where only a part of the purchase money has been paid, to be thus subjected: *Mooring v. McBride*, 62 Tex. 309; *Bogert v. Perry*, 17 Johns. 351; 8 Am. Dec. 411; *Hopkins v. Carey*, 23 Miss. 59; *Hinsdale v. Thornton*, 74 N. C. 167.

The principle upon which the decisions limiting the operation of the statute to "a clear and simple trust, for the benefit of the

debtor" rests is fully recognized by our decisions, and is thus well stated by Chief Justice Moore in the case above cited: "If uncertain interests of this sort are subject to sale under execution, evidently they must be made at enormous sacrifices to debtors, and without effecting the purpose of the law in satisfying the claims of creditors."

According to the agreed case before us, the parties furnishing the money to purchase the land, in the exercise of their legal rights to make such contracts and disposition of their property as they deemed proper, there being no claim of an intent to injure creditors in the creation of the trust, caused to be vested in the trustee Fairbanks the "absolute title" to the property with full power of sale, and provided that the word "trustee" used in the deed with reference to him, should not have the ordinary effect of limiting his title or right to sell, but that he was to be trustee "for the purpose only of accounting for the proceeds arising from any sale or sales of said lands or any part thereof," and that he "should not be released from his personal obligation to account to each of them and to their assigns for the proceeds of any sale or sales of said lands or any part thereof according to their respective interests in such proceeds." It is clear that it was the intention of all parties to so place the entire title, legal and equitable, to the land in the trustees that it would be absolutely beyond the control of either of the cestuis que trust, such cestui que trust to have only the right to demand an accounting of the trustee. The legal effect of the arrangement was to leave in each cestui que trust, not any title legal or equitable in the land, but a mere right in equity to demand an accounting of the proceeds of the sales of the land. Doubtless a court of equity would, in certain contingencies not contemplated by or provided for in the agreement of the parties, such as fraud on the part of the trustee, or a total failure of the objects contemplated by the trust, such as inability to sell the land for sufficient to defray probable expenses, or any other state of facts justifying the dissolution of the trust, treat this mere equitable right of demanding an ³²³ accounting under the agreement, as entitling each cestui que trust to a participation in the division of the trust property itself upon such dissolution; but, in the absence of such a contingency, equity could not recognize the cestui que trust as having any interest in the land, as such, without doing violence to the lawful agreement by which the cestui que trust and the trustee respectively restricted and regulated the rights of each party interested in the trust and without which

it probably would not have been created. We have found no case holding such an interest subject to execution, and to so hold would be going beyond the authorities.

It is not claimed that any such contingency had arisen at the time of the levy. We are, therefore, of the opinion that the equitable interests of French and Rice in the trust were not subject to the levy, and that they could have been reached only by an equitable proceeding for that purpose: *Hinsdale v. Thornton*, 75 N. C. 382; *McIlvaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295, and note. We are not called upon to determine whether the levy would have been valid if such a contingency as would have justified a court of equity in dissolving the trust had arisen before the time of the levy. We have only considered the case presented. We regard article 2291 of the Revised Statutes of 1879 as restricting the right of levy on such trusts as would be otherwise liable and not as granting any additional rights to levy.

The judgment of the court of civil appeals will be reversed and the judgment of the trial court will be affirmed.

Brown, J., not sitting.

EXECUTION—WHAT PROPERTY MAY BE REACHED—TRUST ESTATES.—The interest of a beneficiary under a trust deed is not subject to execution nor to garnishment when the estate is held by trustees with power to take and keep possession thereof, and to apply the income and increase to the support, comfort, and education of such beneficiary, so far as may be required for such purposes: *Meek v. Briggs*, 87 Iowa, 610; 43 Am. St. Rep. 410; *McIlvaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295, and monographic note. Only clear and simple trusts for the benefit of the debtor are liable to execution under the tenth section of the statute of frauds: *Rice ads. Burnett*, 1 Spear Eq. 579; 42 Am. Dec. 336; *Hogan v. Jaques*, 19 N. J. Eq. 123; 97 Am. Dec. 644.

OTTO v. HALFF.

[89 TEXAS, 384.]

ALTERATION IN WRITINGS.—After a note is executed, the payee has no right to alter it so as to show that it bears interest from its date instead of from maturity, though such alteration is to conform it to the agreement of the parties, made before its execution.

PROMISSORY NOTE, EFFECT OF UPON ORIGINAL OBLIGATION.—A note given by a debtor for a pre-existing debt suspends the right of action upon the original consideration until the note becomes due, but if it remains unpaid after that time, the creditor may elect to sue upon the original indebtedness, unless the note was accepted as payment thereof.

ALTERATION OF WRITINGS, WHEN DOES NOT DESTROY RIGHT TO SUE UPON ORIGINAL CONSIDERATION.—

If the holder of a promissory note makes a material alteration in it after it is executed, but without any intention to defraud and in the belief that he had a right to make such alteration to conform the writing to the original agreement of the parties, such alteration does not deprive the holder of the right, on the maturity of the note, to elect to disregard it and to sue upon the original obligation, there being no evidence that the note was accepted as payment thereof.

ALTERATION OF WRITINGS—COLLATERALS, RELEASED OP.—If collaterals are given to secure the payment of a promissory note and the holder's right to enforce it is lost through an alteration of the note by him made after its execution, but under such circumstances that he is entitled to sue upon the original obligation, the collaterals are thereby released.

McNeal, Harwood & Walsh, for the plaintiffs in error.

Levy & Sehorn, for the defendants in error.

BROWN, A. J. On December 18, 1893, L. Otto was indebted to M. Halff & Bro. on open account for merchandise sold him to the amount of \$2,635.11, to become due in January and February, 1894. On that date defendants agreed with J. A. Otto, who represented L. Otto as his agent, on terms of settlement, as follows: L. Otto to pay cash \$297.41 and to give a note for \$2,337.70, to become due November 1, 1894, to bear interest from date at ten per cent per annum, to be secured by a deposit with the defendants of four notes of M. and R. J. Ellis payable to L. Otto for the sum of \$513.40 each. L. Otto paid the cash payment, and one of the defendants wrote the note provided for, but by mistake made the interest payable from maturity. By subsequent agreement, the maturity of the note was extended to January 1, 1895. When Halff & Bro. ascertained the mistake in the note reading "interest payable from maturity," instead of "from date," one of the firm, who had written the note, drew a line through the word "maturity" and wrote the word "date." This was done with no intent to defraud Otto, but the party making the change at the time believed that he had the legal right to so change the note as to make it express the contract as it was actually made between the parties. Two payments were made upon the note, one dated January 9, 1894, of \$234.10, the other October 24, 1894, of \$204.80.

J. A. Otto was the agent of L. Otto in this transaction, and was his general agent in the management of the business. J. A. Otto also signed the note.

The foregoing is substantially the findings of the district court, which were adopted by the court of civil appeals, with this modification: "That the testimony introduced on behalf of appellants shows that the collaterals were offered and given to appellees in

order to secure the account and its extension, and that it is not strictly accurate to state, as the collaterals imply, that they were given to secure the note."

The note given by L. and J. A. Otto recites that L. Otto having deposited with the payees, Halff & Bro., as collateral security for the payment of this note, and also all other present or future demands of any kinds of said bank against the undersigned, due and undue, the following property (then proceeds to describe the five notes signed by Maggie Ellis and R. J. Ellis), and empowers the payees to sell the notes so deposited as collateral without notice, upon the failure of the payors in the said note to make payment thereof.

This suit was commenced by Louis and J. A. Otto against Halff & Bro. to enjoin them from disposing of the collateral notes and to cancel the note above described made by the said Louis and J. A. Otto to Halff & Bro. Halff & Bro. filed a plea in the nature of a cross-bill, setting up ³⁸⁹ the original account, confessing the change made in the note, setting up the agreement as to interest and alleging that the change was made for the purpose of making the note conform to the agreement, and asking judgment upon the original indebtedness less the credits thereon.

Upon trial before the court without a jury, a judgment was rendered canceling the note made by Louis and J. A. Otto to Halff & Bro. and giving judgment in favor of M. Halff & Bro. against Louis Otto for the amount of the original account, less the payments made, to bear six per cent interest from the date of the judgment, and in favor of the said Louis and J. A. Otto for all costs of suit. The judgment of the district court was affirmed by the court of civil appeals.

Plaintiff in error assigns the following grounds as cause for reversing the judgment of the court of civil appeals: 1. That the court of civil appeals erred in refusing to find additional facts as requested by the appellant. This court has no means of correcting such error, if it be such upon writ of error to this court. 2. The plaintiffs in error complain that the findings of the district judge were made and filed without the request of either party to the suit. We think that the court of civil appeals properly disposed of this question. 3. That the court of civil appeals erred in finding that the change made by Halff & Bro. in the note was not done fraudulently. This is a question of fact upon which there was evidence sufficient to sustain the finding of the court and it cannot be reviewed by this court. 4.

That the court of civil appeals erred in holding that although the original note was void by reason of the alteration made therein, it was competent for the defendants Halff & Bro. to recover the original consideration for which the note was given. 5. The court of civil appeals erred in holding that the collateral deposited by Louis Otto to secure the note made by him to Halff & Bro. should be held for the satisfaction of the consideration of said note—that is, the account due by Otto to Halff & Bro.

It is conceded by the defendants in error that the alteration made by Halff & Bro. in the note given to them by L. and J. A. Otto was material, and that the effect of such alteration was to render the note invalid for any purpose. It is unnecessary to cite authorities to sustain this proposition, as it is well settled and denied by but few courts. But it is claimed on the part of the plaintiff in error that the note being rendered invalid, Halff & Bro. could not recover upon the original consideration because: 1. The giving of the note operated to satisfy the pre-existing debt; 2. If that be not true, then that the alteration of the note having destroyed it, the law visits upon them the forfeiture of the original debt, although the alteration was made without any fraudulent intent and for the purpose of making it conform to the intention of the parties, which intention was not expressed by reason of a mistake of the person who prepared the note in failing to strike out the word "maturity" ³⁹⁰ and insert "date," showing the time from which the note should bear interest.

In support of the proposition that the execution of a note by a debtor operates to satisfy the pre-existing indebtedness for which the note is given, we are referred to the case of *Wilkinson v. Thulemeyer*, 44 Tex. 470, in which it is said: "If the suit be treated as having a written account for a basis, then the execution of the notes was a satisfaction of the account, and a recovery could not be had on it. If the notes were of any validity at all against Wilkinson, they certainly closed the account." An examination of that case will show that the question was not before the court, the real issues being, that the account was barred by the statute of limitation, the suit being upon that, and that the note was not declared upon in the petition. That case, therefore, is not authority upon this question.

The rule is established by the great weight of authority in England and the courts of the American states, that where a debt exists and a note is given therefor by the debtor, the right of action is suspended upon the original consideration until the

note becomes due, and if it is unpaid at that time the creditor may elect to sue upon the original indebtedness or upon the note unless the note was accepted as payment of the pre-existing debt. If suit be brought upon the original consideration and the note be negotiable, the plaintiff must show that it has not been transferred and is lost or destroyed or he must produce and surrender it: 2 Daniel on Negotiable Instruments, sec. 1272; Stedman v. Gooch, 1 Esp. 3; Price v. Price, 16 Mees. & W. 231; Greenwood v. Curtis, 6 Mass. 358; 4 Am. Dec. 145; Watkins v. Hill, 8 Pick. 522; Phoenix Ins. Co. v. Allen, 11 Mich. 501; 83 Am. Dec. 756; Matteson v. Ellsworth, 33 Wis. 488; 14 Am. Rep. 766; Morrison v. Welty, 18 Md. 169; Muldoon v. Whitlock, 1 Cow. 290; 13 Am. Dec. 533; Hawley v. Foote, 19 Wend. 516; Frisbie v. Larned, 21 Wend. 450; Cole v. Sackett, 1 Hill, 516; Hughes v. Wheeler, 8 Cow. 77; Burdick v. Green, 15 Johns. 247; Putnam v. Lewis, 8 Johns. 389.

Nothing in the evidence shows that there was any agreement or understanding that the note given by L. and J. A. Otto should be accepted as a payment of the original account. The account, therefore, was not discharged or satisfied by the execution of the note, but the right of action by Halff & Bro. was thereby suspended until the date named for the payment of the note, and the maker of the note having set up the invalidity of that instrument and sought to cancel it, Halff & Bro. had the right to recover upon the original consideration, unless they are deprived of that right by making the change in the note.

The plaintiff in error cites many authorities to support the contrary view, but, upon a careful examination of them, we think that they are not in point, being cases in which the questions now before the court were not involved. In the cases cited there are expressions of the courts which might be construed to support the proposition of plaintiff in error, but, considered in reference to the facts, they cannot have the effect to support the proposition to which they are cited. Reliance is placed by the plaintiff ²⁹¹ in error upon the case of Wheelock v. Freeman, 13 Pick. 165; 23 Am. Dec. 674. In that case this question was not involved directly, but the court there held that "there were no two distinct debts, one arising upon the parol bargain which was discharged by notes, and another upon the notes. The consideration for the land was the express promise of which the notes were the evidence, and then the well-known rule applied, that when there is an express promise the law implies none and when the evidence of the contract is in writing, it must be produced

at the trial. To say that before and independently of the alteration of the notes the plaintiff could recover would be to hold that in all cases where upon a sale of property or other negotiation a party has promised to pay money and given his note at the time in conformity with such promise, the holder may still waive the note and sue on such original express parol promise."

"If it is said that he is remitted to this right in consequence of the notes having become void by the alteration, so that the plaintiff cannot recover on them, this is to hold that a party can acquire a right of action by his own fraudulent acts in altering his security to the injury of the other party, an act which the law thus deems fraudulent, and in consequence thereof holds the note void because it tends to the injury of the other party." In that case the distinction was drawn that there was no pre-existing debt upon which suit could have been maintained, and the decision based upon the fact that the change of the note was the fraudulent act of the payee and therefore he could not recover. The interpretation placed upon that case by the plaintiffs in error would put it in conflict with *Greenwood v. Curtis*, 6 Mass. 358, 4 Am. Dec. 145, and *Watkins v. Hill*, 8 Pick. 522, decided by the same court.

The findings of fact filed by the judge who tried this case below establish that J. A. Otto, as agent of Louis Otto, agreed with Halff & Bro. that Louis Otto should execute to Halff & Bro. a note for the balance of the account due to them, the note to become due at a future date and to bear interest from date at ten per cent. S. Halff, one of the firm, procured a blank note from a bank upon which to write the note agreed to be given, in which blank note was printed the words "from maturity," and by mistake in preparing the note the word "maturity" was not stricken out and "date" written in, in accordance with the agreement. The note thus prepared was taken by J. A. Otto to Louis Otto for his signature. It was signed by both of the Ottos and returned to Halff & Bro. After the note matured the mistake was discovered, and S. Halff, who had prepared the note, marked out the word "maturity" and wrote above it the word "date," making the note as changed read "to bear interest from date," instead of "maturity." This was done with the purpose to make the note conform to the agreement made between the parties and without any intent to defraud the makers. It is insisted that for this act Halff & Bro. are to suffer the penalty of forfeiting the entire debt and will not be permitted to

recover upon the account which it is admitted Louis Otto owed to them.

In support of this contention, counsel for the plaintiffs in error have ³⁰² cited numerous authorities, which we have carefully examined, but deem it unnecessary to comment upon them at length. Counsel rely mainly upon the following cases: *Wheelock v. Freeman*, 13 Pick. 165; 23 Am. Dec. 674; *White v. Hass*, 32 Ala. 430; 70 Am. Dec. 548; *Newell v. Mayberry*, 3 Leigh, 250; 23 Am. Dec. 261. We have already stated what the issue was in the case of *Wheelock v. Freeman*, 13 Pick. 165, 23 Am. Dec. 674, and the points upon which the court decided that case.

In *White v. Hass*, 32 Ala. 420, 70 Am. Dec. 548, there was no proof offered nor contention made that the alteration was innocently made, and the court treated it as fraudulent, saying: "And to allow the payee, after he had designedly made a material alteration in the note without the assent of the maker, to recover upon the contract for which the note was given, would be to depart from the sound and just principle that no one should be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected."

Neither was there any explanation of the change made in the instrument in the case of *Newell v. Mayberry*, 3 Leigh, 250, 23 Am. Dec. 261, and the court used this language: "For the principle long since established as to bonds, is extended by recent decisions to other instruments, upon the principle that no man should be permitted to take the chance of gain by the commission of a fraud without running the risk of loss in case of detection."

It will be observed that the above cases rest upon the presumption of fraud arising from the fact that the act was unexplained and in the interest of the person making the change. They correctly announce the law upon the facts of those cases. We have not found an authority which sustains the contention of the counsel for plaintiff in error to the extent that an alteration to conform the instrument to the actual agreement will forfeit the right to sue on the original consideration. It is true that the language used in some of the cases is very broad, and when considered apart from the facts might be understood to go to the extent claimed, but every decision must be interpreted according to the facts upon which it rests, and, so considered, the authorities cited do not embrace this question.

In *Daniel on Negotiable Instruments*, volume 2, page 1413, the rule is well stated in this language: "When an instrument has been materially altered it cannot be sued upon in its altered form

nor read in evidence to support an action even when brought by a bona fide holder without notice; but when the party making the alteration discharges the burden of proof upon him by showing that the material alteration was made by mistake and without fraudulent intent, the right of action upon the consideration for which it was given remains."

In addition to what is stated by Mr. Daniel, as quoted, the authorities sustain the proposition that where the change has been made with the honest purpose to make the instrument conform to the agreement of the parties, the instrument will be destroyed by the alteration, if material, but the party making the change will be permitted to recover upon the original consideration for which the note was given. We cite the following authorities in support of this proposition: *Merrick v. Boury*, 4 Ohio St. 60; *Morrison v. Huggins*, 53 Iowa, 76; *Krause v. ³⁰³ Meyer*, 32 Iowa, 566; *Clough v. Seay*, 49 Iowa, 111; *Booth v. Powers*, 56 N. Y. 22; *Lewis v. Schenck*, 18 N. J. Eq. 459; 90 Am. Dec. 631; *Vogle v. Ripper*, 34 Ill. 100; 85 Am. Dec. 298; *Clute v. Small*, 17 Wend. 238; *Ames v. Colburn*, 11 Gray, 390; 71 Am. Dec. 723.

In the case of *Ames v. Colburn*, 11 Gray, 390, 71 Am. Dec. 723, decided by the supreme court of Massachusetts, the change made in the note was as to the date, which is held to be a material alteration in such an instrument. The court said: "The alteration of the date of the note was made by the promisee without the knowledge or express consent of the promisor; but as the arbitrator has found that it was made without any fraudulent intention, and merely to correct a mistake and make the note such as both parties intended it should be or understood that it was, we are of opinion, upon the authorities, that the note was not vacated by the alteration, and that the plaintiff is entitled to judgment on the award." There are a number of cases which hold the same doctrine, but we do not approve this case to the extent that it goes in holding that the note was not vacated, yet it is strong authority to show that the courts of Massachusetts do not hold the rigid doctrine as claimed to have been laid down in the case of *Wheelock v. Freeman*, 13 Pick. 165; 23 Am. Dec. 674.

It is urged that public policy demands that the rigid rule of forfeiture of the debt, though there be no fraud intended in making the change in the instrument, shall be adopted in this state, because, it is said, to follow the other and more humane and just rule, would open the door to fraud, supported by perjury. The same objection may be urged to every rule of law which permits parties to show mistakes in the writing and preparation of in-

struments, for in each case the existence of a mistake must be shown by human testimony, and is, therefore, liable equally as in this case to be false. The law does not presume that men will commit perjury, nor that they will perpetrate frauds upon their fellow men, but, when the facts justify, the law will presume fraud from the acts done, and, when the fraud is established, will punish the guilty party by refusing to give relief to the party perpetrating the fraud, and therefore deny him the right to collect the debt for which the instrument was given; not that justice to the maker of the note demands such punishment, but for the protection of the interests of the public and the preservation of the integrity of that character of instruments. The aim of the law is to punish the guilty, but the result of the rule claimed would be to visit that punishment upon the innocent. No injustice has been done Louis Otto in this case. He admits that he owed Halff & Bro. the account to the amount which they claim, and that he has not paid it. If he had a defense against it, he could have made it, notwithstanding the change in the note. He has had the extension of time upon his indebtedness that he contracted for, and his only complaint is that the innocent act of Halff in correcting the mistake is not punished by releasing him, Otto, from the payment of a just demand.

It is claimed that Louis Otto did not know of the agreement made by his agent to pay interest from date, and that it is, therefore, not a case of mutual mistake. The court finds that his agent made the agreement, ²⁰⁴ that Halff & Bro., relying upon it, changed the note to correspond to that agreement, which relieves the case of any fraudulent intent for which the law will inflict the penalty of forfeiture. It is not necessary in this case for us to decide whether or not Halff & Bro. might have claimed a reformation of the contract to make it correspond to the agreement with the agent. They had no right to change the note without the consent of Otto and must suffer the consequences of having that note rendered invalid, but it does not follow that they must likewise be deprived of the right to recover that which was due them upon the open account. There was no error in giving judgment upon the account in favor of Halff & Bro. against Louis Otto.

The note given by Otto to Halff & Bro. specifically stated for what the collaterals were pledged, and all previous verbal agreements upon that subject were merged in the note. The note being discharged by the alteration made in it, the collaterals were likewise discharged; and the court erred in holding that Halff &

Bro. could retain the collateral notes to secure this account, for which error the judgments of the district court and court of civil appeals will be reversed and judgment rendered as follows: It is ordered that the note for \$2,337.70 executed and delivered by Louis Otto and J. A. Otto to M. Halff & Bro., dated December 18, 1893, to become due November 1, 1894, be and the same is hereby canceled, and that the four notes signed by Maggie Ellis and J. R. Ellis payable to Louis Otto for \$513.40 each, be restored by M. Halff & Bro. to Louis Otto, and that Louis and J. A. Otto recover of M. Halff & Bro. all costs in all the courts, for which execution may issue. It is further ordered that M. Halff & Bro. recover of Louis Otto the sum of \$1,996.46, with six per cent interest from the twenty-fifth day of April, 1895, for which execution may issue.

ALTERATION OF INSTRUMENTS—INTENT TO DEFRAUD—EFFECT UPON ORIGINAL CONSIDERATION.—The holder of a written security or evidence of debt, who has altered or changed the instrument in a material part to his own advantage, with intent to defraud his debtor, cannot recover thereon. Such alteration extinguishes the debt: *Warder etc. Co. v. Willyard*, 46 Minn. 531; 24 Am. St. Rep. 250. But the intention with which an alteration is made is a material fact; and if the alteration is not fraudulent, although the identity of the instrument may be destroyed, it will not operate to cancel the debt of which the instrument is merely evidence: *Vogle v. Ripper*, 34 Ill. 100; 85 Am. Dec. 298, and note: *Hunt v. Gray*, 85 N. J. 227; 10 Am. Rep. 232. See, also, extended note to *Draper v. Wood*, 17 Am. Rep. 105.

PAYMENT.—Acceptance of a note for the amount of a debt is not a payment thereof, unless the parties so agree: *Johnson v. Barrilla*, 27 Or. 251; 50 Am. St. Rep. 717, and note. It does not discharge the original indebtedness, though it may extend the time for its payment. After the lapse of the time specified in the notes, if they remain unpaid, the holder is again at liberty to sue and recover upon the original indebtedness: Monographic note to *Kilpatrick, v. Kansas City etc. R. R. Co.*, 41 Am. St. Rep. 761.

AMORY MANUFACTURING COMPANY v. GULF, COLORADO & SANTA FE RAILWAY COMPANY.

[89 TEXAS, 419.]

CONTRACT, CONSTRUCTION OF LANGUAGE AGAINST THE PARTY USING IT.—If a written contract reasonably admits of two constructions, that is to be adopted which is least favorable to the party whose language it is. This rule is especially applicable against carriers in construing bills of lading issued by them.

CARRIERS, PROPERTY, WHEN COMMENCES TO BE IN TRANSIT OR IN DEPOT.—If, while cotton is in possession of a

compress company for the purpose of being compressed, a common carrier issues a bill of lading binding himself to transport it to a place designated, it cannot be regarded as "in transit," or "in depot" while it remains on the platform of the compress company.

CONTRACTS, CONSTRUCTION OF.—PUNCTUATION is a most fallible standard by which to interpret a writing, but it may be resorted to when other means fail.

Coke & Coke, for the plaintiff in error.

Alexander Clark & Hall, for the defendant in error.

⁴²⁴ GAINES, C. J. This suit was brought by the plaintiff in error against the defendant in error to recover the value of fifty bales of cotton. The cotton was bought by J. H. Brown & Co. and was placed upon the platform of a compress company at Honey Grove, Texas, for the purpose of being compressed. While it was still in possession of the compress company, and upon its platform, the defendant in error executed to Brown & Co. a bill of lading therefor, in which, upon certain conditions, it bound itself to transport the cotton to Manchester, New Hampshire. After the execution of the bill of lading, and while the cotton still remained upon the platform, it was destroyed by fire. It was admitted upon the trial that at the time of the loss the cotton was the property of the plaintiff. The trial court found that the fire was not the result of the negligence of the defendant company, and held that, by reason of certain stipulations in the bill of lading which restricted its liability as to common law, the defendant was not liable. The judgment of the trial court was affirmed by the court of civil appeals.

The errors assigned in this court are: 1. That it was error to hold that under the bill of lading the defendant was exempted from liability for the loss of the cotton while at the compress; and 2. That the evidence was not sufficient to show that the cotton was not destroyed through the negligence of the defendant.

In our view of the case, the determination of the first assignment renders a decision of the other unnecessary. Omitting so much as has no bearing upon its construction, the special provision in the bill of lading reads as follows:

"The packages aforesaid [the cotton] must pass through the custody ⁴²⁵ of several carriers before reaching their destination, and it is understood, as a part of the consideration for which said packages are received, that the exceptions from liability made by such carriers respectively in their several bills of lading for through freight shall operate in the carriage by them respectively of said packages, as though herein inserted at length; and espe-

cially that neither this company, nor any of said carriers, while in transit, or while in depot or place of transshipment, or of landing at place of delivery, shall be liable for loss or damage to hay, hemp, cotton."

In order to sustain the ruling of the court of civil appeals and of the trial court, it must be held that the cotton while upon the platform of the compress company was either "in transit" or "in depot" within the meaning of these terms as used in the bill of lading. The rule is elementary that, if a written contract, when viewed as a whole and in the light of the attendant circumstances, reasonably admits of two constructions, that one is to be adopted which is least favorable to the party whose language it is. To no class of contracts has the rule been applied with more stringency than to those in which common carriers seek to limit their liability as it exists at common law. In general, not only are the bills of lading drawn by the carrier and tendered to the shipper to be accepted by him without alteration, but they are also executed upon forms prepared for the purpose of protecting the interest of the carrier, with all the care and ability which experience in the business and professional skill can bring to bear upon the subject. The rule does not require that a strained construction should be put upon the contract of shipment, in order to favor the shipper; but rather, that in case of a reasonable doubt as to which of two constructions best accords with the intent of the parties, that should prevail which is least favorable to the carrier.

Was the cotton while on the compress platform "in transit," within the meaning of the bill of lading? It is contended upon the one side, that the words "in transit" are the equivalent of the words "in transitu," and that goods in the hands of a carrier are in transit from the moment of delivery to the carrier until they reach the hands of the consignee. In sense, the meaning of the two phrases is the same; the one is a literal translation of the other; but as actually employed they have a materially different meaning and application. "In transit" means literally, in course of passing from point to point, and such is its common acceptance. Such, also, is the literal meaning of the phrase "in transitu"; but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It would seem, therefore, that if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption

from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. Had they done so, a more difficult question ⁴²⁶ would have been presented. But here the words "in transit"—the words actually used—according to their ordinary signification, apply only to the cotton from the time the transportation was to begin until the time it was to end under the contract. The cotton, not having been set in motion toward its destination, was not in fact in transit, and we cannot hold it constructively in transit while on the platform without unwarrantably extending the meaning of a well-defined word and doing violence to a well-established canon of construction. Our interpretation of the word is strengthened by the fact that, in addition to exemption while in transit, the contract also provides that the company is not to be liable for loss of the cotton while in depot or place of transshipment or of landing at place of delivery. If the words "in transit" are to be given the broad construction contended for, then this additional provision is unnecessary. It is to be presumed that the express provision, that the company was not to be liable for loss while in depot or place of transshipment or of landing at place of delivery, was incorporated for a purpose, and the inference is strong that the purpose was to supply that which would have been wanting without it. In the absence of the well-recognized rule of construction applicable to these contracts, we should be constrained to hold that the phrase "while in transit" did not exempt the company from the loss of the cotton before the transportation actually began; and, in any event, there is such grave doubt as to the construction of the phrase as would require that the doubt should be resolved in favor of the shipper. The question has been passed upon in two cases, in both of which the ruling was in accordance with our view: *Deming v. Merchant's Cottonpress etc. Co.*, 90 Tenn. 310; *Menzell v. Railway Co.*, 1 Dill. 531.

We come, then, to the question, Was the cotton "in depot" within the meaning of the contract, when it was destroyed? The clause in which the words quoted are found admits of two constructions—one as if it read "or while in depot, or while in place of transshipment"—the other as if the words were "while in depot or transshipment or place of transshipment." If the former be the correct rendering of the clause, then the company would not have been liable for the loss of the cotton while at its depot at the initial point of the carriage; and we would have the question whether the com-

press platform should be deemed a depot within the meaning of the contract. But we think the latter the better construction. The words "depot" and "place" stand in close connection, being separated only by the disjunctive conjunction, and, by a strict grammatical construction, occupy precisely the same relation to the other words of the clause. If it were intended to say depot or other place of transshipment, the words accurately expressed the idea, and no others are necessary to be supplied. But if it were intended to mean any depot, then, to express fully and accurately the meaning, we must insert the words "in" or "while in" before the word "place." In addition, the punctuation supports our construction of the language. If there had been a comma after the word "depot," it would have indicated that it was the purpose to detach that word from those next succeeding and to render⁴²⁷ it independent of and unqualified by them. But the instrument, though in print, as appears from a fac-simile found in the transcript, and though carefully and correctly punctuated, has no comma at the place indicated. This we think tends to show that it was intended that the word "depot" should be qualified by the subsequent words in the clause, and that only depots of transshipment were meant. The supreme court of the United States say that "punctuation is a most fallible standard by which to interpret a writing," but "it may be resorted to when all other means fail": *Ewing v. Burnet*, 11 Pet. 41. It would seem that the clause in question was inserted with a view to meet the decision in *Menzell v. Railway Co.*, 1 Dill. 531, in which Judge Dillon held that the words "in transit" in a similar bill of lading did not exempt the carrier from liability for the goods while in its depot at a place of transshipment.

It may be true that no satisfactory answer can be given to the question why the defendant should limit its liability from the very moment the transportation began until the delivery of the cotton to the consignee, and it should omit to limit it at its receiving depot. It may be that its intention was to make its exemption general and to contract that it should not be liable for the loss of the property either while in transit or while at the place it was received or a place of transshipment or the place of delivery. But that is not the question. The inquiry is, Did it so express that intention that the shipper, upon the inspection of the bill of lading, should have seen that it admitted of no other reasonable construction? As has been seen, we are of the opinion that the question must be answered in the negative and the maxim, "*Fortius contra proferentem*," must apply.

The case having been tried without a jury, the trial court found the facts, and his conclusions in that respect are not controverted. The value of the cotton was fixed by the agreement of the parties at the trial. Accordingly, the judgments of the district court and of the court of civil appeals are reversed, and judgment is here rendered for the plaintiff in error for the value of the property at the time of its destruction, with interest as a part of the damage.

CONTRACTS—CONSTRUCTION IN FAVOR OF COVENANTEE. In interpreting words in a contract of which there is an uncertainty whether they should be used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the covenantee: *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758; note to *Cravens v. Eagle Cotton Mills Co.*, 16 Am. St. Rep. 306; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337, and note.

CONTRACTS — CONSTRUCTION — PUNCTUATION.—Punctuation may aid in ascertaining the true reading of a contract; but its absence cannot vitiate the contract: *White v. Smith*, 33 Pa. St. 186; 75 Am. Dec. 539.

CARRIERS—LIABILITY—WHEN COMMENCES.—The liability of a carrier commences with the delivery of goods to him or his agent at a place where the carrier is accustomed to receive goods, or where in individual cases he agrees to receive them: *Southern Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783. It is not prevented from attaching by the fact that the carrier is not ready to perform its duty and retains the property in its possession because not then able to provide the means of transportation: *London etc. Ins. Co. v. Rome etc. R. R. Co.*, 144 N. Y. 200; 43 Am. St. Rep. 752, and note. See, also, notes to *Scheu v. Benedict*, 15 Am. St. Rep. 429, and *Jasper etc. Co. v. Kansas City etc. R. R. Co.*, 42 Am. St. Rep. 83.

THE CLARENDON LAND INVESTMENT AND AGENCY COMPANY v. McCLELLAND BROTHERS.

[89 TEXAS. 483.]

ANIMALS, DUTY OF OWNER TO KEEP IN INCLOSURE.—The common law which required every man to restrain his cattle, either by tethering or by inclosure has never been in force in Texas, and every owner of land in that state who desires to exclude therefrom any cattle running at large, or in an adjoining pasture, must throw around his own land an inclosure sufficient to exclude all animals of the class intended to be excluded which are of ordinary disposition as to breaking fences or other inclosures.

ANIMALS COMMUNICATING DISEASE, LIABILITY OF OWNER FOR.—The owner of cattle is not liable for their straying on the lands of another through his imperfect fence, and there communicating disease to the latter's cattle, though the former knew that such fence was defective and that his cattle were likely to break through it and to communicate disease.

ANIMALS COMMUNICATING DISEASE, LIABILITY OF OWNER DEPENDS ON HIS NEGLIGENCE.—Though the owner of land has thereon a fence sufficient to exclude cattle of ordinary disposition as to fence breaking, he cannot recover of the owner of animals of a vicious and breachy disposition for breaking into such inclosure and communicating disease to animals therein, unless he can show that the owner of the animals thus inflicting injury had notice both of their breachy disposition and of their being in a condition to communicate disease.

ANIMALS, TRESPASSING, LIABILITY OF—JURY TRIAL.—It is error to instruct a jury, in an action to recover damages for injuries alleged to have been received by plaintiff through the defendant's cattle breaking into the plaintiff's inclosure and thereby communicating disease to his cattle, that if the defendant had reason to believe that his cattle were liable to communicate disease from the fact that they were driven from a certain locality, then the defendant would be liable for the result of their communicating disease. Such a charge is upon the weight of the evidence.

NEGLECT IN MAINTAINING FENCES—BURDEN OF PROOF.—In an action by a landowner to recover for injuries alleged to have been received through cattle breaking into his inclosed lands and communicating disease to his cattle therein, in which defendant claims that the negligence of the plaintiff in not maintaining proper fences contributed to his injury, the defendant need not assume the burden of proving the condition of the fences. The plaintiff must prove that his fences were in proper condition, and that his loss was not due to his negligence in maintaining them.

ANIMALS COMMUNICATING DISEASE TO OTHERS, LIABILITY FOR.—If the owner of cattle knows that they are liable to break through a fence sufficient to keep out animals of their species of ordinary disposition, and knows, or has reason to believe, that they will communicate disease to others of their kind, he is liable if they break through such an inclosure and communicate disease to other cattle therein.

Matlock & Boyce, for the plaintiff in error.

Browning & Madden, for the defendants in error.

⁴⁸⁸ **BROWN, A. J.** McClelland Brothers, the defendants in error, owned a pasture in Donley county, consisting of about two thousand acres of land, which was inclosed by a wire fence on cedar posts. The fence, however, was not a lawful fence under the law of this state as applicable to cultivated lands. In the pasture they had cattle of the short-horn, Jersey, and Holstein breeds, consisting of full bloods and grades of those breeds.

The plaintiff in error—a corporation organized under the laws of Great Britain—owned lands in the same county, which entirely surrounded that of McClelland Brothers, and which lands the plaintiff in error inclosed for the purpose of pasturing cattle thereon. In the year 1889, the corporation bought about four thousand head of yearlings—called by the witness “dogies”—in Tarrant and other counties east of that, which were placed in the

pasture of the corporation. Some of the yearlings passed out of the pasture of the plaintiff in error into that of the defendants in error at different times during that year. After the yearlings were in the pasture of the defendants in error, a number of their fine cattle died from a disease called "Texas fever," but it does not appear from the evidence that the yearlings had the disease at the time.

McClelland Brothers sued the corporation for the value of the cattle that died and for damages to others that had the fever but did not die, charging that the yearlings of the plaintiff in error were of a breachy character and that they were liable to communicate the Texas fever to the cattle of the plaintiff, all of which was alleged to be known to the said corporation or its agents.

The corporation answered by general denial and by special plea to the effect that the plaintiffs' fence was insufficient to turn the cattle of the said corporation, and that the plaintiffs therein were guilty of negligence in not keeping their fence in proper repair. It also denied that the said cattle were breachy in character or liable to communicate any disease to the plaintiffs' cattle, but if such were the fact, then it alleged that it did not know of such fact.

Trial was had before a jury, which resulted in a verdict and judgment for the plaintiffs, McClelland Brothers, for seventeen hundred and forty eight dollars and thirty-six cents, which judgment was affirmed by the court of civil appeals.

⁴⁸⁷ This case was before this court on writ of error granted to a judgment rendered by the court of civil appeals affirming a judgment of the district court at a former trial. The report of the case as decided in this court will be found in Clarendon Land etc. Co. v. McClelland, 86 Tex. 179. By the opinion of the court, by Justice Gaines, these propositions of law are clearly announced: 1. That the common-law rule which required every man to restrain his cattle either by tethering or by inclosure is not in force in this state, and that every owner of land in this state, who desires to exclude therefrom cattle running at large or in an adjoining pasture, situated as these pastures were, must throw around his own land an inclosure sufficient to exclude all animals of the class intended to be excluded, of ordinary disposition as to breaking fences or inclosures; 2. It is the right of every owner of domestic animals which are not known to him to be vicious, mischievous, or diseased, to allow them to run at large or to occupy his own inclosed lands when adjoining those of another; 3. If the owners of land have around it a fence sufficient to turn cattle of

all sizes and kinds of ordinary disposition as to breaking fences, and the inclosure is entered by cattle which are known to the owners to be vicious, in the sense that they have the habit of breaking into inclosures when the same class of cattle would not ordinarily do so, the owner of such cattle would be liable for such damages thereby occasioned as would ordinarily result from such trespass, and if, in addition to the known habits of fence-breaking, the owner knows or has reason to believe that such cattle would be liable to communicate an infectious disease to others upon coming in contact with them, the owner would be liable, in case of trespass by such cattle by breaking such fence, for the damage occasioned by the communication of such infectious or contagious disease to the cattle belonging to the owner of the inclosure so broken.

Upon the second trial of this case in the district court, the judge gave charges which are deemed to be in conflict with the rules of law announced in the former opinion, of which charges plaintiff in error complains in its application for writ of error herein.

We think the use of the word "ordinary," in its connection with other language in the third charge as given by the court, was calculated to mislead the jury, yet, if the defendant desired it explained, it should have asked a proper charge upon the subject. The second special charge requested by the defendant and refused by the court was properly refused because it assumed that the plaintiffs' fence was defective, and no other charge was asked which tended to explain the word "ordinary," as used in the third paragraph of the charge of the court.

The second charge given by the trial court reads as follows: "You are instructed, under the law applicable to this case, that if the cattle of one person wander from the owner's range or pasture upon the uninclosed or imperfectly inclosed lands of another, they are not trespassers and the owner is not liable for any damage they may inflict, unless such owner knew that the cattle could pass through such inclosure and that they ⁴⁸⁸ were likely to communicate diseases to the cattle of the person whose inclosure they might enter."

The same proposition is announced in the fifth and sixth charges of the court, which make an application of the principle announced in the second charge to the particular facts of the case. The effect of these charges was to instruct the jury that if the plaintiff's lands were imperfectly inclosed—that is, if the fence around them was not sufficient to keep out cattle of ordi-

nary disposition as to fencebreaking—and if the owner of the cattle knew that the fence was imperfectly constructed, then the owner of such cattle would be liable for damages, which might be occasioned to the plaintiffs' cattle by reason of their passing through the imperfect fence of the plaintiff. In other words, a man who owns land and has around it a fence which is insufficient to exclude from his premises the cattle of his neighbors, can, by giving notice to such neighbors of the imperfect condition of his own fence, cast upon them the burden of restraining their stock from running at large upon the range, or, as in this case, from permitting the cattle to occupy the pasture lands of the defendant, and render the defendant in this case liable for damages which might have been committed upon the plaintiff's land by reason of the defective condition of the plaintiff's fence because of the fact that the owner of the cattle had notice of the defects in the fence. If such a proposition were correct, as a matter of law, then it would change the rule as announced in the opinion of this court, which is well sustained by authorities in this state, to the effect that the owner of cattle may permit them to run at large without restraint and that it devolved upon the owner of other land to exclude them by a sufficient fence thrown around such lands. Under this rule thus announced by the court below the plaintiffs might be permitted to avoid the consequences of their own negligence in failing to erect a proper fence, and visit the consequences of that negligence upon the defendant simply because it had notice of the bad condition of their fence. The proposition does not admit of argument; it is too plainly contrary to the law to require argument to refute it.

The third charge as given by the trial court reads as follows: "The owner, however, of a pasture which has an inclosure sufficient to prevent the entry of all ordinary animals of the class intended to be excluded is entitled to recover damages from the owner of stock running at large upon the adjacent range or pasture that forcibly break through such inclosure, if such stock are of the class intended to be excluded and the entry would not have been made but for the vicious, breachy, or fence-breaking character of such animals, or when such stock by their entry communicated disease or otherwise damaged stock of the owner of the inclosure; and in such case, the owner of the inclosure would be entitled to recover the damages so sustained by him, notwithstanding the owner of the stock so trespassing may not have known of the breachy or fence-breaking character of the stock, and their liability to communicate disease."

This charge is in substance repeated in the seventh charge given by the ⁴⁸⁰ court, and is therein applied to the facts of this case. In effect, the court charges the jury that if the plaintiffs had a fence around their pasture sufficient to turn or exclude therefrom cattle of the kind owned by the plaintiff, of ordinary disposition as to fence-breaking, and if the defendant's cattle were vicious and breachy or fence-breaking in character, and by reason of such character entered the inclosure of the plaintiff and thereby communicated disease to the plaintiff's cattle, the defendant would be liable for such damages, although it neither knew of the disposition of its cattle to break the fences or their liability to communicate disease to the plaintiff's cattle. This proposition is in direct conflict with the former opinion of this court, in which it was said: "It is the right of every owner of domestic animals in this state not known to be diseased, vicious, or breachy to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighborhood. For these reasons we think there was error in the charge complained of, for which the judgment must be reversed." We cannot conceive of language which would more definitely express a proposition of law at variance with the charge as given by the court than that quoted above. If the owner of the stock in this case had permitted them to run at large upon his lands, and such lands had been uninclosed, instead of being inclosed, as they were, then, under the proposition stated in the opinion as quoted above, in order to render it liable for damages on account of their breaking through the inclosure of the plaintiffs, it would be necessary for the plaintiffs to show that the defendant knew or had reason to believe that such cattle were vicious or breachy, and were liable to communicate the disease to plaintiff's cattle. Under the charge given by the court, all that was necessary for the plaintiffs to prove, in order to establish their right, was, that they had a fence sufficient to turn cattle of the kind owned by the defendant, if they were of ordinary disposition, and that defendant's cattle were breachy, which would cast upon the defendant liability for the result of such breaking, whether it knew of such habits or the existence of the disease communicated or not.

In the fifth charge the court, in effect, instructed the jury that if the defendant had reason to believe that its cattle were liable to communicate disease to the plaintiff's cattle from the fact that they were driven from a certain locality, then the defendant would be liable for the result of their communicating such disease. At the time of this transaction, there was no law which

forbade persons to drive cattle from one portion of the state to another, and we do not believe that it can be assumed as a matter of law that the cattle driven from one section of the state to another are liable to communicate any disease to cattle in the section to which they are driven. This would be a matter of proof, and the question as to whether the locality from which they were driven would operate as notice to the persons buying and driving them of their liability to communicate such disease would depend upon the evidence as to whether or not the facts known to defendant were such as to have the effect of notice, or whether it was known as a fact by the persons so purchasing and driving ⁴⁹⁰ them. This part of the charge, we think, was upon the weight of the evidence, and should not have been given.

The eighth charge given by the court is not complained of in this court, but, in view of the fact that this case must be reversed, we deem it proper to call attention thereto, in order that it may not be again repeated and furnish ground for complaint in the future. It is as follows: "If you find from the evidence that the cattle of the defendant company did enter the inclosure of the plaintiff and did communicate the disease to plaintiff's cattle, in order to excuse the defendant on account of the negligence or carelessness of the plaintiffs in permitting their inclosure to remain in a defective condition, or their gates to be left open, it is incumbent upon the defendant, upon this issue, to establish such negligence on the part of the plaintiff by a preponderance of the testimony upon said issue, and show that said negligence on the part of the plaintiff was the cause of the damage, if any, resulting to the plaintiffs." This cast upon the defendant the burden of showing that the fence of the plaintiff was in a defective condition when entered by the defendant's cattle, whereas the plaintiffs' right of action depends upon the fact that they had a fence sufficient to turn cattle of ordinary disposition, and that the defendant's cattle were of a vicious or breachy character and so known to be by the defendant. The burden of proof was upon the plaintiffs to establish their case throughout, and did not shift to the defendant under any circumstances, and the above charge, which has the effect to cast the burden upon the defendant, was improperly given by the court.

It was the duty of the plaintiffs, under the facts of this case, to inclose their lands with a fence sufficient to exclude therefrom cattle of all sizes and kinds, of ordinary disposition as to breaking fences, and if they did not have such a fence they cannot recover for any damages occasioned by the entry of defendant's

cattle upon their land, because the entry and the damages would be the result of their own negligence: *Scott v. Grover*, 56 Vt. 499; 48 Am. Rep. 814. If the plaintiffs' fence were sufficient to turn cattle of ordinary disposition, and defendant's cattle were, to an extent more than usual with such stock, disposed to break through fences, if this was known to the defendant or its servants, and by reason of that disposition the cattle broke into plaintiffs' inclosure, defendant would be liable for such damages as would usually arise from such trespass, and if the defendant's cattle so entering were liable to impart to others a disease by contact and association with them, and defendant knew this or had good reason to believe it to be true, then it would be liable for the effects of such disease, if communicated by its cattle entering the plaintiffs' pasture, under the circumstances stated.

If, however, the defendant did not know of the vicious or fence-breaking character of its cattle, and had no knowledge of circumstances sufficient to charge it with notice thereof, it would not be liable for damages occasioned by such an entry into the plaintiffs' land: *Vrooman v. Lawyer*, 13 Johns. 339; *Van Leuven v. Lyke*, 1 N. Y. 515; 49 Am. Dec. 346. If the defendant ⁴⁹¹ knew that its cattle were unusually disposed to break fences, but did not know and had no good reason to believe that they were liable to communicate diseases to others, it would not be responsible for the effect of such disease actually imparted to the plaintiffs' cattle by such a breaking of their fence: *Cooley on Torts*, 403; *Coyle v. Conway*, 35 Mo. App. 496; *Patee v. Adams*, 37 Kan. 133.

Mr. Cooley, in his work on *Torts*, in treating of this subject, says: "But there are other mischiefs which may be committed by domestic animals that one is under no obligation to anticipate and guard against, because they are not the result of a general propensity, but are committed, if at all, by exceptionally vicious individuals of the particular species of animals. Thus, though every horse will roam into neighboring fields if not restrained from doing so, it is only in rare and exceptional cases that a horse will attack and injure those who come near him. Therefore, while the owner should anticipate and protect against trespasses on lands by his horses, he is under no moral obligation to anticipate that a horse in which no such disposition has been discovered will suddenly make an assault upon and kick and bite some passer-by who chances to come within his reach. For this reason the keeper of a domestic animal is not in general responsible for any mischief that may be done by such animal which was of a kind not to

be expected from him, and which it would not be negligence in the keeper to fail to guard against."

We are aware that Mr. Thompson, in his work on Negligence, volume 1, section 21, page 206, and Shearman and Redfield, in their work on the same subject, section 633, assert the contrary doctrine as to diseased stock, and there are cases in the reports of some states to the same effect, but we believe that the doctrine announced by Mr. Cooley is supported by the better reason. The cases of Coyle v. Conway, 35 Mo. App. 490, and Patee v. Adams, 37 Kan. 133, bear more directly upon this question, involving the liability of the owner for the communication of the same character of disease as in this case.

It was lawful for defendant to place its cattle in its own pasture, even if known to be diseased, and it would not be liable unless negligent in the manner of keeping them: Fisher v. Clark, 41 Barb. 329; Walker v. Herron, 22 Tex. 56; 1 Am. & Eng. Ency. of Law, 585.

We can see no reason why the owner of stock afflicted with an unknown latent disease should be liable for its communication to others, any more than if the same animal had an unknown vicious habit which caused an injury. The ground of liability is that the party to be charged has been guilty of negligence in permitting the animal diseased, or of vicious habits, to go upon the land of another party, and there to inflict an injury, because the care to be exercised must be commensurate with the danger. If there be no knowledge of the existence of a disease, how could there be negligence in reference thereto? If the negligence of permitting the horse to stray upon the land of another unlawfully will not render the owner liable for an injury inflicted by it while thus trespassing, because ⁴⁹² of the fact that the vicious habits from which the injury arose are unknown to the owner, then how can it be said that the owner of the diseased animal, which commits a like trespass, is to be held liable for the damages arising from its diseased condition, when he knew nothing of that condition, and was guilty of no negligence in reference thereto? We think the rule laid down by Mr. Cooley is applicable to both classes of cases and should govern in this case.

The district court erred in giving the charges as hereinbefore indicated, and the court of civil appeals erred in not sustaining the assignment of error thereto and reversing the judgment, for which reason the judgments of both the said courts are hereby reversed, and this cause is remanded for further trial in accordance with this and the former opinion of this court.

ON MOTION FOR REHEARING.

BROWN, A. J. Counsel for defendants in error have entered a vigorous and earnest protest against the conclusions announced by this court, in our opinion heretofore rendered in this case, and, on account of the importance of the questions involved, we have given more than usual time to a mature and thorough reconsideration of the opinion heretofore delivered, upon the points objected to in motion for rehearing.

Counsel announces that the rule laid down by this court will operate disastrously to certain portions of the state, and to certain interests involved therein or affected thereby. The law upon this subject applies to all portions of the state alike, and to all interests of the different classes of citizens, whether they be in one part or another of its territory. It has been held that the law of this state upon the subject of lawful fences does not apply to lands used for pasture purposes, but this does not make a distinction between agricultural lands located in the Panhandle, or other grazing portions of the state, and like lands located in the agricultural sections. If land be used in the grazing districts for agricultural purposes, it must be inclosed by a fence such as is prescribed by the statute in order to enable the owner to recover damages for trespass committed by cattle or horses belonging to other persons. Likewise, if lands in the agricultural section of the state be used for pasture purposes, the rights of the owner must be governed by the same rule as the rights of like owners of land used for like purposes in any other part of the state. The courts cannot limit the operation of any decision announced to any particular district or country. It is within the power of the legislature to so adjust the laws as to give them local effect upon these questions, and, if the law as it exists is inapplicable to any particular section, then the legislature has the authority to so change the law as to adapt it to the best interests of the people living in such section, and we presume that it will be done whenever the necessity arises.

⁴⁹³ It is claimed on the part of the defendants in error that the charges asked by the plaintiff in error in the court below, and refused by the trial judge, embrace substantially the same proposition as those given by the court in its general charge to the jury. This is true as to some portions of the charge, but not as to others, and, upon careful examination of those charges, we do not think that it can be properly said that the errors for which this judgment has been reversed can be attributed to the action of the defendant. The charge given by the judge who tried the

case in the district court is admirably framed to express his view of the law applicable to the facts, but we believe that the view presented by the charge of the court is not correct, and that the error resulted from a misconception of the opinion delivered in this case when it was before this court at a former term. It is claimed that the opinion of the court as last rendered is in conflict with the opinion delivered upon a former hearing, but, upon examination of both opinions, we do not think that this criticism is justified. We will not, however, enter into a discussion of that matter on this motion.

It is claimed that the opinion now under review is erroneous in announcing these propositions:

1. "If plaintiffs' fence was sufficient to turn cattle of ordinary disposition, and defendant's cattle were to an extent more than usual with such stock disposed to break through fences, if this was known to the defendant or its servants, and by reason of that disposition the cattle broke into plaintiffs' inclosure, defendant would be liable for such damage as would usually arise from such trespass, and if the defendant's cattle so entering were liable to impart to others a disease by contact and association with them, and defendant knew this, or had good reason to believe it true, then it would be liable for the effects of such disease, if communicated by its cattle entering the pasture under the circumstances stated. If, however, the defendant did not know of the vicious or fence-breaking character of its cattle, and had no knowledge of circumstances sufficient to charge it with notice thereof, it would not be liable for damages occasioned by such an entry upon plaintiffs' land."

2. "If the defendant knew that its cattle were unusually disposed to break fences, but did not know, and had no good reason to believe, that they were liable to impart disease to others, it would not be liable for the effect of such disease actually imparted to the plaintiffs' cattle by such a breaking of their fence."

As it has been before held by this court, the common law upon the subject under consideration is not in force in this state, and therefore the rules of law applied in determining the liability of the owner of stock for trespasses are inapplicable in this state. The common-law rule is clearly stated by Shearman and Redfield on the Law of Negligence, section 627, as follows: "The owner of large animals (such as horses, oxen, sheep, etc.) is under an unqualified obligation at common law to restrain them from trespassing upon lands of other persons, and he is therefore unconditionally liable as a trespasser himself for any trespass com-

nitted ⁴⁹⁴ by his animate property. The law conclusively presumes negligence against him without regard to the facts of the particular case. Whatever damage his animal does while trespassing is an aggravation of the trespass for which he is also liable." Thus the failure to perform the duty of restraining horses, cattle, or sheep by the owner, under the common law, constituted upon his part negligence which, in contemplation of law, made him a trespasser by reason of the act of such stock in entering upon the lands of another. The liability is placed distinctly upon the ground that the negligence is conclusively presumed from a failure to obey the requirements of the law.

In this state the rule is reversed, and the burden rests upon the landowner to exclude from his land the stock of other persons by throwing around such land a fence sufficient to prevent entry thereon by all such stock not of a fence-breaking or vicious disposition. In the opinion delivered by Chief Justice Gaines on a former hearing it is said: "It is a right of every owner of domestic animals in this state, not known to be diseased, vicious, or breachy, to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighborhood. . . . If the agents of the defendant corporation knew that their calves could pass through the plaintiffs' inclosure, and that they were likely to communicate disease to the latter's cattle, it was negligence on his part not to confine them, and for the consequences of that negligence it would be liable." Again, in the same opinion, it is said: "We do not hold that for no breach of its fence, and invasion of its pasture by domestic animals, could a landowner recover under our law. It may be admitted that if his inclosure be sufficient to exclude all cattle of an ordinary disposition, he would have the right to recover for the trespass of such as were peculiarly vicious and prone to break fences. The owner of a dog may, as a general rule, permit him with impunity to run at large, but, if he knows him to be vicious and does not restrain him, he is liable for any injury he may inflict upon the person or property; and it would seem that the same principle should apply to the owner of any domestic animal known to him as being accustomed to break through an ordinary good and sufficient fence."

From these quotations we think that it is clear that the court distinctly held, in its former opinion quoted from, that the owner of cattle had a right to permit them to run at large upon the open range, or upon his own inclosed lands, unless they were known to be breachy or fencebreaking, vicious or diseased, and that it

was the duty of the landowner to exclude such stock from his land by a sufficient fence for that purpose, and also, if such stock should make an entry into the lands of another inclosed by a fence sufficient to turn ordinary stock, the owner of the stock would be liable for such trespass, if he knew that they were of a disposition to break fences and enter inclosures not common to that class of cattle. The liability upon the stockowner having such notice would be for such damages as that character of animal might be expected to commit by entering upon the land of another, but, in the language ⁴⁹⁵ quoted herein from the opinion on former hearing, it is distinctly stated that the liability for the results of disease, communicated to the cattle of another, would depend upon whether or not the owner of such cattle knew of the existence of the disease, and the liability of its communication by reason of association and contact with others, and this liability is placed upon the ground that it would be negligence in the owner to so keep such stock that they might thus communicate the disease to the stock of his neighbor. The writer of this does not see how it would be possible to express the conclusion in more apt language than that which is used by the chief justice of this court, which we have herein quoted.

If the liability for damages rests upon the ground of negligence, and that negligence at common law is presumed from a failure to perform the duty of restraint, then, there being no duty of restraint of the animal placed upon the owner by the laws of this state, there can be no negligence in permitting such cattle to run at large or upon the land of their owner, unless knowledge of the character of the stock as to fence-breaking qualities and their condition as to disease, be brought home to the owner, and there being no negligence, liability does not exist. In the opinion now being considered, we stated that a contrary proposition was announced by Thompson, and Shearman and Redfield on Negligence. We have examined the cases cited by those authors in support of the text, and do not find the proposition well supported by the cases cited.

Herrick v. Gary, 65 Ill. 101, and Sangamon etc. Co. v. Young, 77 Ill. 197, both arose under statutes of that state, and neither of them involves or discusses the question of notice to the owner of the condition or character of the stock committing the trespass. Liability is placed solely upon the ground that the statute was violated in introducing into the state and keeping the animals prohibited by law.

Anderson v. Bucklin, 1 Strange, 192, and Barnum v. Van

Dusen, 16 Conn. 200, are cited by both authors in support of the proposition asserted by them. In the former case the question of notice is not mentioned; the only point discussed in that case being whether or not the plaintiff was entitled to recover the cost of the proceeding. In the latter case the proof of knowledge by the owner of the diseased condition of the stock in question was made upon the trial, and the question before the court was whether or not knowledge of that condition should have been alleged in the pleading. This case seems likewise to rest upon a statute of the state of Connecticut, and is not authority upon this question.

Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99, which is not cited by either of the authors referred to, comes more nearly determining the question and supporting the proposition contended for by the defendant in error in this case, but in that case the animal which committed the trespass was unlawfully and wrongfully running at large, and the case was decided strictly under the common-law rule.

Cook v. Waring, 2 Hurl. & C. 338, supports the opinion heretofore rendered in this case. In that case the question now before the court was thoroughly discussed and decided. It was there held that in order to ⁴⁹⁶ hold the owner of sheep responsible for the communication by them of disease to others by entering upon the lands of another, it must be shown that the owner of the diseased sheep had knowledge of their diseased condition before the injury occurred.

As before quoted, it is said in the opinion delivered in this case by Chief Justice Gaines: "The owner of a dog may, as a general rule, permit him with impunity to run at large, but, if he knows him to be vicious and does not restrain him, he is liable for any injury he may inflict upon person or property." And "it is the right of every owner of domestic animals in this state not known to be diseased, vicious, or breachy to allow them to run at large." And it is said that the principle of the common law applicable to the owner of the dog "should apply to the owner of any domestic animal known to him as being accustomed to break through an ordinarily good and sufficient fence." Applying, then, the same doctrine to the owner of the cattle in this instance that would be applied at common law to the owner of a dog, we have as a logical conclusion that the owner of cattle not known to be breachy or vicious may lawfully permit them to run at large, and is not liable for trespasses committed by them (except upon lands inclosed with a sufficient fence under the statute), unless he

knows that they are breachy and liable to break fences. In case of a statutory fence the owner of the stock would be liable for the ordinary consequence of such trespass.

We find no reason to change our opinion in this case, and the motion for rehearing is therefore overruled.

ANIMALS—CUSTODY AND RESTRAINT OF BY THE OWNER. The owner of cattle must, at common law, keep them off of the lands of other persons, whether such lands are fenced or unfenced: *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 49 Am. Dec. 239, and extended note showing the extent to which this rule has been abrogated in the United States. See, also, *Eames v. Salem etc. R. R. Co.*, 98 Mass. 560; 96 Am. Dec. 676, and note; *Waters v. Moss*, 12 Cal. 535; 73 Am. Dec. 561, and note.

ANIMALS COMMUNICATING DISEASE—LIABILITY OF OWNER.—The principle is well established that the person by whose fault animals suffering from a contagious disease are placed in a position where they will, in the natural course of things, communicate the disease to other animals must respond in damages to the owner of the latter, if he is, on his part, free from negligence: Monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 831; monographic notes to *Hurst v. Warner*, 47 Am. St. Rep. 550, 551, and to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 257.

INSTRUCTIONS AS TO WEIGHT OF EVIDENCE.—The court cannot instruct upon the weight of evidence or the credibility of witnesses: *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 850; *Mattingly v. Pennie*, 105 Cal. 514; 45 Am. St. Rep. 87.

REISNER v. GULF, COLORADO & SANTA FE RAILWAY COMPANY.

[89 TEXAS, 656.]

JURISDICTION, CONCURRENT, WHEN BECOMES EXCLUSIVE.—When the jurisdiction of a court attaches to any subject matter of jurisdiction, although concurrent with other courts, it becomes exclusive for all purposes necessary to the accomplishment of the object of the suit.

RECEIVER, APPLICATION FOR, WHEN PLACES PROPERTY IN THE CUSTODY OF THE LAW.—If a bill is filed having for its object the appointment of a receiver to take into custody the property of the defendant and to pay and discharge all his liabilities therefrom, the jurisdiction of the court at once attaches to such property, so that no interference with it on the part of other courts will be allowed.

GARNISHMENT.—AFTER AN APPLICATION FOR A RECEIVER of the defendant's property has been made, and the judge has so acted upon it as to indicate that he will investigate the matter and may appoint a receiver, the property of the defendant must be regarded as in the custody of the law to the extent that no subsequent garnishment of it can be made as against receivers afterward appointed upon such prior application.

Coleman & Ross, for the appellant.

Hutcheson, Campbell & Sears and Head, Dillard & Muse, for the receivers.

⁶⁵⁷ **BROWN, A. J.** The court of civil appeals for the first supreme judicial district has certified to this court the following statement and questions:

"Appellant sued the Texas, Louisiana & Eastern Railway Company in the county court of Harris county for a debt, and on the thirtieth day of December, 1893, sued out a writ of garnishment against the Gulf, Colorado & Santa Fe Railway Company, which was duly served on the second day of January, 1894. The garnishee filed its answer March 10, 1894, admitting that at the date of the service of the garnishment it was indebted to the Texas, Louisiana & Eastern Railway Company, but set up the facts stated below to show that the fund was not subject to the writ, and asked that the receivers of the defendant company's property be made parties to the suit in order that the questions involved might be adjudicated. The receivers, Putnam and Lazarus, intervened, also setting up the facts stated to show that the debt in question was not subject to garnishment, and that they, as such receivers, were entitled to collect and administer it under the orders of the court which appointed them.

"The facts shown in support of the claim of the receivers are as follows: On the twenty-fifth day of December, 1893, there was presented to Hon. David E. Bryant, one of the judges of the circuit court of the United States for the eastern district of Texas, a bill in equity in behalf of Samuel A. Walker v. The Texas, Louisiana & Eastern Railway Company, ⁶⁵⁸ requesting the appointment of receivers for said company, its assets and property. The nature of this bill is not further shown by the record before us. It was ordered filed by Judge Bryant, and was filed in said circuit court on the twenty-ninth day of December, 1893. No other action was taken upon it until February 1, 1894; when Judge Bryant appointed the intervenors as receivers of the defendant railway company, with power to take possession of same and all of its property, and ordered that such property be delivered to them. The receivers qualified and took possession of the properties before the trial of this suit in the county court. Plaintiff Riesner recovered judgment against the defendant company for his debt, but the county court held that it had no jurisdiction to subject the fund in hands of the garnishee, and dissolved the garnishment and discharged the garnishee.

“Upon these facts the following questions are certified for decision: 1. Was the fund in the hands of the garnishee, at the time of the service of the writ, subject to the garnishment, or did the application for the appointment of receivers of the property of the defendant, considered in connection with the subsequent action of the federal court, put such fund beyond the reach of the writ? 2. If the fund was subject to garnishment when it was served, must the fund be subjected by the ordinary statutory judgment rendered by the court issuing the writ, or should the garnishment be simply sustained by the judgment rendered, leaving the plaintiff to seek satisfaction through the orders of the court having charge of the receivership?”

It is generally held by the courts and stated by the text-writers that when the jurisdiction of a court attaches to any subject matter of litigation, although concurrent with another or other courts, it becomes exclusive for all purposes necessary to the accomplishment of the objects of the suit: Waite on Insolvent Corporations, sec. 261; High on Receivers, sec. 52. That is, if a bill be filed in one court, which has for its object the appointment of a receiver to take into custody the property of the defendant and to pay and discharge the debts of such defendant, from the time that the jurisdiction attaches to the property no interference on the part of other courts will be allowed.

But this general statement leaves open the question as to when, and under what circumstances, the jurisdiction of the first court does in fact attach so as to give it exclusive control of the property sought to be subjected. In this state it has been established that whenever a court of competent jurisdiction has appointed a receiver for a corporation or for an individual or copartnership, the jurisdiction of that court attaches to the property of such corporation, person, or firm, although the receiver has not qualified nor taken possession of the property: Texas Trunk Ry. Co. v. Lewis, 81 Tex. 1; 26 Am. St. Rep. 776. In the case last cited, Chief Justice Stayton, speaking for the court, quoted from the case of Maynard v. Bond, 67 Mo. 315, as follows: “The counsel for the sheriff only objects that he was prior in right to the receiver, because his levy was made before the receiver had executed and filed the bond to be given by him. When the ⁶⁵⁰ court in such cases appoints a receiver, it is because the court has first adjudged that the property is no longer to be under the control of the parties to the suit, but is thenceforth to be and is in the custody of the court. A receiver then becomes merely an agent through whom the court acts, and whether he be forthwith

appointed by the court, as in this case, or a reference be made to a master or a referee to appoint one, in either case the effect is the same; the title of the receiver is of the date at which it is ordered that a receiver be appointed. Then the title of the parties to control dies, and then the title of the court and of its agent and officer immediately succeeds." This, in substance, asserts the proposition that whenever the judge of the court has acted upon the application in such way as to indicate that he has determined that he will investigate the matter and may appoint a receiver at some future date, the property is thereafter considered in the custody of the law, and not liable to the process of any other court pending such investigation. This doctrine is sustained in the cases of *May v. Printup*, 59 Ga. 128, and *Adams v. Mercantile Trust Co.*, 66 Fed. Rep. 617, as well as other cases. In the former case the United States circuit court for the state of Georgia had appointed a receiver for a railroad company, and, after administering the property in the hands of the receiver for a time, discharged him therefrom, after which another application was filed in the same cause, asking the appointment of another receiver, which second application was pending in that court and a time set for hearing it, when a like application was made in a state court in the state of Georgia asking the appointment of a receiver for the same railroad company. The state court made the appointment of a receiver in the case, who took possession of the property, and afterward the United States circuit court also appointed a receiver in the case therein pending, the latter court directing its receiver to apply to the state court for possession of the property. The receiver appointed by the federal court intervened in the state court, setting up the facts, and asked that the property be delivered into his possession in accordance with the appointment made by the United States circuit court. The state court of Georgia ordered its receiver to turn over the property to the receiver of the federal court, which order, upon appeal, was affirmed by the supreme court of that state.

In the case of *Adams v. Mercantile Trust Co.*, 66 Fed. Rep. 617, opinion delivered by Judge Pardee, the United States circuit court of appeals reversed the judgment of the circuit court of the United States in the state of Florida, and directed it to turn over to the receiver of the state court the property of the defendant in that suit upon a state of facts very similar to that which existed in the case of *May v. Printup*, 59 Ga. 128. Judge Pardee quoted from the opinion of Judge Wood as follows: "Is actual

seizure of the property necessary to the jurisdiction of the court? In my judgment it is not. In this case I think the jurisdiction of the United States circuit court for the northern district of Georgia first attached to the property, because the suit in that court was first commenced and service of subpoena ⁶⁶⁰ made, and because: 1. One of the main objects of the suit was to obtain possession of the property, and such possession was necessary to the full relief prayed by the bill; and 2. Because by the service of the restraining order enjoining the defendant company from delivering possession of the trust property to any person except a receiver appointed by this court in this cause, the court acquired constructive possession, and from the moment of the service of the restraining order the property was in gremio legis." Of this, Judge Pardee expressed his approval, saying: "The views expressed by Judge Wood have been accepted and followed in this circuit, at least, and we fully concur therein as the correct exposition of the law, and one particularly applicable to the present case; while the decision of Mr. Justice Bradley, doubted by himself, is open to the objection that thereby jurisdiction is frequently made to depend upon a race between marshals and sheriffs, likely to result in unseemly controversies between the state and the federal courts."

In accordance with the expression quoted from the opinion of Judge Wood above, it has been generally held by the federal courts that when a bill has been filed which seeks to subject the property of a corporation, person, or copartnership to the payment of the debts of all creditors, and prays for the appointment of a receiver to administer the same, and when service of citation has been had upon the defendant, the jurisdiction of the court attaches to such property so as to exclude the interference of any other court therewith: *Belmont Nail Co. v. Columbia etc. Co.*, 46 Fed. Rep. 8; *Shields v. Coleman*, 157 U. S. 168; *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Gaylord v. Fort Wayne etc. R. R. Co.*, 6 Biss. 292; *Union etc. Ins. Co. v. University*, 6 Fed. Rep. 443; *Owens v. Ohio Cent. Ry. Co.*, 20 Fed. Rep. 10; *Chittenden v. Brewster*, 2 Wall. 191; *Adams v. Mercantile Trust Co.*, 66 Fed. Rep. 617; *Foster's Fed. Prac.*, sec. 9. In the case of *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776, our supreme court went no further than to decide that the appointment of a receiver without his qualification operated to place the property in custodia legis, but it was strongly intimated that this was not the limit at which this court would stop on the question of jurisdiction. From the statement which accompanies the questions

propounded, we conclude that no service of process was had in the case pending in the federal court when the writ of garnishment was served in this case, and the question as to what would be the proper rule in case process had been served before the service of the writ of garnishment is not before us for decision.

It does appear from the statement that the petition in the case instituted in the federal court seeking the appointment of a receiver was presented to the Hon. David E. Bryant, judge of the United States circuit court for the eastern district of Texas, which petition he acted upon so far as to examine it and order it filed; from which we conclude that he determined that the allegations of the petition were sufficient to show a prima facie case for the appointment of a receiver, and that by his action he sent the petition to be filed in his court for future consideration. This action of the judge was sufficient, if followed up in due time by the ⁶⁸¹ appointment of a receiver, to fix the jurisdiction of that court upon all the property of the defendant in that suit as to liens thereafter attempted to be acquired through the process of other courts. Under such circumstances the appointment when made would relate back to the filing of the bill: *Levi v. Columbia Life Ins. Co.*, 1 Fed. Rep. 206. Of course, what we have said might not apply to a case where third parties had acquired rights in the property for a valuable consideration without notice, as for instance by purchase from the defendant or by a contract lien for a valuable consideration paid. If such a case should arise, we feel sure that the equities of such persons would be properly recognized and protected by that honorable court.

In *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776, Chief Justice Stayton strongly intimates that the filing of a bill or petition asking for a receiver might be held to fix the jurisdiction of the court in which it was filed from the time of such filing and before the service of process or action by the court, but it is not necessary for us to decide that question in this case, and we leave it an open question as we find it under the authorities. While there are many expressions in the text books and in the decided cases which would lead to such a conclusion, we have not been able to find any case in which the question was involved and decided. Counsel for the receivers, intervenors in this case, urge upon this court, as authority settling the question that the filing of a bill fixes the jurisdiction of the court over the property of the defendant, the cases of *Chittenden v. Brewster*, 2 Wall. 191, and *Gaylord v. Fort Wayne etc. R. R. Co.*, 6 Biss. 286. In the former case a bill had been filed in the circuit court of the United

States attacking the validity of an assignment made by the debtor defendant, to which the assignees were parties. The purpose of the bill was to set aside that instrument and to have a receiver appointed to administer the assets. Service of process was had upon all of the defendants, the assignees appeared in court and answered before any proceeding was instituted in the state court for the appointment of a receiver for the same property. That case differs from the one now before the court in this, that the instrument under which the assignees held the property was attacked directly in the proceeding and sought to be annulled, which necessarily gave the court jurisdiction of the property involved, and, in addition thereto, the court had acquired jurisdiction of the debtor and the assignees by service of process and answer filed before the proceeding in the state court was inaugurated. In this case no service had been had upon the defendant when the writ of garnishment was issued, and there was no specific attack made upon the title or claim of any person to the property, but simply for the general purpose of placing all of the property of the defendant in the hands of a receiver for due administration. In the case of *Gaylord v. Fort Wayne etc. R. R. Co.*, 6 Biss. 286, service had been made upon the defendant before any proceeding was inaugurated in the state court; the court said: "Of course, in all that has been said it is assumed, what was the fact in this case, that the bill was not only filed in this case, but that the process was issued and duly served ⁰⁶² upon the parties, and that they were in court subject to its jurisdiction before any proceeding was instituted in the state court."

Neither of these cases involve the point insisted upon by counsel for the receivers in this case, that the filing of the bill of itself gave jurisdiction to the court over the property of defendant. They, however, tend to support the position.

On the other hand, there are expressions by high authority which would lead to the conclusion that no such result would follow the filing of a bill without service of process and without action by the court. Whenever that question shall arise in any case in the future, we feel confident that the courts will, in the true spirit of comity and fairness, determine and settle it with proper limitations so as to guard against the perpetration of fraud and the jeopardizing of the rights of others to which it might be peculiarly liable unless properly guarded.

It is fortunate for the country, for the interests of public justice, and to the credit of the judiciary, both federal and state, that, with few exceptions, the courts, both federal and state, have

been liberal and just in determining questions which involve the conflict of jurisdiction. So long as these tribunals manifest the spirit of comity and fairness displayed in the cases of *Adams v. Mercantile Trust Co.*, 66 Fed. Rep. 617, and *May v. Printup*, 59 Ga. 128, there can be no serious disturbance of that harmony which should prevail between these independent but co-ordinate jurisdictions, and "races between marshals and sheriffs likely to result in unseemly controversies between the state and federal courts" will be avoided, because when either court may feel that its jurisdiction has been invaded, upon application by its receiver to the court which has taken possession of the property, the wrong will be righted in a spirit of fairness and justice, as was done in the cases cited above and in this case in the county court.

It will be unnecessary to answer the second question, and to the first question we answer that the funds in the hands of the garnishee at the time of the service of the writ should be held not to be subject to garnishment when presented upon the application or intervention of receivers as in this case, and the county court properly held that such funds should not be thus subjected to the payment of the plaintiff's debt. We do not mean to say that if no intervention had been filed by the receivers, or action taken to bring the question before the county court, and it had rendered judgment against the garnishee that such judgment would be void so as not to protect it when paid. But we hold that upon such application or intervention it was the duty of the county court to order that the garnishee be discharged.

JURISDICTION—CONCURRENT—WHEN BECOMES EXCLUSIVE.—When the courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other: *Gay v. Brierfield Coal etc. Co.*, 94 Ala. 303; 33 Am. St. Rep. 122, and note; *Plume etc. Mfg. Co. v. Caldwell*, 136 Ill. 163; 29 Am. St. Rep. 305, and extended note on conflicts of jurisdiction.

RECEIVERS—PROPERTY IN CUSTODY OF—ATTACHMENT OF.—After the appointment of a receiver, the property to which the receivership relates is in the custody of the law, even before he qualifies, so as to exempt it from the levy of an attachment: *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1; 26 Am. St. Rep. 776; *Gilman v. Ketcham*, 84 Wis. 60; 36 Am. St. Rep. 899; *Adams v. Haskell*, 6 Cal. 113; 65 Am. Dec. 491. As to when such attachment may be effectual, see *Dunsmoor v. Furstenfeldt*, 88 Cal. 522; 22 Am. St. Rep. 331. A receiver cannot be sued or garnished without leave of the court that appointed him: *People v. Brooks*, 40 Mich. 333; 29 Am. Rep. 534.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

DABNEY v. STATE.

[118 ALABAMA, 88.]

HOMICIDE—SELF-DEFENSE WHEN UNLAWFUL.—One who provokes a difficulty and by his own wrong contributes to a situation out of which arises a necessity to take the life of another to preserve his own, cannot invoke the doctrine of self-defense to justify a homicide committed under such circumstances. Illicit sexual intercourse with the wife of the party killed is such a wrong as takes away from the slayer the right of self-defense.

HOMICIDE—ADULTERY AS PROVOCATION.—Illicit sexual intercourse with the wife of another is such a wrong, and so obviously calculated to bring on a difficulty with the husband, that the law recognizes it as a provocation sufficient to reduce the killing of the adulteress and her paramour by the husband, upon detecting them in the act, to manslaughter.

HOMICIDE—MURDER—SELF-DEFENSE.—One who enters upon the commission of a wrongful act, and, contemplating that another may interfere with his enterprise, arms himself with a deadly weapon with intent to take the life of that other should it become necessary to save his own in the course of such interference, and who in fact does take the life of the interferer, in pursuance of such intent, is guilty of murder in the first degree.

HOMICIDE—MURDER BY PARAMOUR.—If a man seeking illicit sexual intercourse with another's wife is interfered with by the husband, whom he kills during the course of such interference with a deadly weapon, with which he has armed himself with intent to kill if necessary to save his own life upon being interfered with, he is guilty of murder in the first degree.

MURDER—EVIDENCE OF POWDER BURNS.—If, on a trial for murder, the evidence shows that the deceased was killed by being shot as he entered the door of a certain house, a witness, upon being asked, after describing the scene of the killing, "If he saw any powder burns upon the door of said house," may testify as to his familiarity with powder burns, and, that, in his opinion, there were powder burns upon the door of such house.

MURDER—EVIDENCE OF FORMER DIFFICULTY.—If, on a trial for murder, the evidence shows that the deceased was killed by the accused upon being discovered in illicit sexual relations with the wife of the former, evidence that a short time prior to the

homicide, or at the time thereof, the deceased attempted to kill his wife is immaterial, irrelevant, and inadmissible.

MURDER — EVIDENCE OF GOOD CHARACTER — INSTRUCTIONS.—A request to charge, in a murder trial, that "the jury may look at the good character of the defendant with the other evidence in the case, and this good character may of itself be sufficient to generate a reasonable doubt of defendant's guilt, is properly refused as giving undue weight to the fact of defendant's good character.

Indictment and trial for murder. Conviction of murder in the second degree. Defendant appealed. On the trial the evidence tended to show that upon the night of the killing one Faulkner came to the house occupied by his wife, Harriet, and asked for admittance, which being refused, he proceeded to break down the door and upon entering was shot by the defendant Dabney, after Faulkner had stated that he had come to kill both of the parties in the house and entered with his pistol drawn and pointed at defendant, who had no means of escape except through the door mentioned. Upon the trial, a witness, after testifying as to the scene of the murder, was asked "If he saw any powder burns upon the door of said house?" and over the defendant's objection and exception, answered "that he saw something on the facing of the door that looked like powder burns, that he was familiar with powder burns, and, in his opinion, it was powder burns." The wife of the deceased, while a witness, was asked if Faulkner "did not try to kill her on the previous Saturday night, and if he did not try to shoot her on the Saturday night of the killing." An objection to the question was sustained and the defendant excepted. The court, of its own motion, charged the jury as follows: "The mere fact of itself and alone that the defendant was caught in company with the wife of the deceased, and in preparation of a contemplated act of adultery, if the evidence establishes beyond a reasonable doubt that such was the case, does not deprive the defendant of the doctrine of self-defense, provided there was a present impending peril to life or danger of great bodily harm, either real or so apparent as to create a bona fide belief of an existing necessity for taking the life of the deceased, and provided there was, at the time, no convenient or reasonable mode of escape by flight without increasing his own peril. But if the defendant, having reason to believe that he would probably be detected by the deceased in his contemplated adulterous intercourse, if such were his purpose, while armed with a deadly weapon, and with the preconceived purpose and formed design of using said weapon on the deceased should

he be thus detected, and should it become necessary to protect himself from any assault the deceased might make on him, even of a deadly nature, then defendant would be deprived of the doctrine of self-defense; for, under such facts, if they be facts, he would not be free from fault in bringing on the difficulty. But such facts must be established to the satisfaction of the jury beyond all reasonable doubt, and the burden of proof is on the state, when the jury are satisfied, from the evidence, of the existence of the other elements as before charged, necessary to invoke this doctrine." The following instructions were given on behalf of the prosecution: "If the jury believe from the evidence, beyond a reasonable doubt, that in this county, and before the finding of this indictment, the defendant went to the house of Harriet Faulkner, armed with a deadly weapon, for the purpose of having adulterous intercourse with the said Harriet Faulkner, and with the formed design to shoot and kill Flem Faulkner, her husband, should he interfere during said illicit connection, and that said Flem Faulkner came upon defendant while defendant was in the house of his wife Harriet, and said Harriet had off her dress and with the light out, and demanded and was refused admittance, and that the deceased drew his pistol on defendant, and pointed it at him, and thereupon defendant killed Flem Faulkner in pursuance of a formed design to do so, the defendant would be guilty of murder in the first degree." 2. "The defendant cannot be said to have been free from fault in bringing on the difficulty if he went to the house of the wife of the deceased for the purpose of having carnal intercourse with her, and there was reasonable probability that the husband would come upon him in the act or before, or just after the act, and went there armed with a pistol with the formed design to shoot his way out, should he be attacked by the husband under such circumstances." The defendant excepted to the giving of all of the above charges, and also to the refusal of the court to give the following charge as requested: "The jury may look at the good character of the defendant in connection with the other evidence in the case, and this good character may of itself be sufficient to generate a reasonable doubt of defendant's guilt."

W. C. Fitts, attorney general, for the state.

⁴² McCLELLAN, J. It is, and always has been, an elementary principle of criminal law, so familiar as not even to require a citation of our own numerous adjudications upon it, that one

who provokes a difficulty—who by his own wrong contributes to a situation out of which arises a necessity to take the life of another to preserve his own—cannot invoke the doctrine of self-defense to justify the homicide he commits in such difficulty—cannot plead a necessity to kill which arose from his own wrong. Sexual intercourse with the wife of another is such a wrong, so obviously calculated to bring on a difficulty with the husband, as that the law itself recognizes it as provocation sufficient to reduce the killing of the adulteress and her paramour by the husband, upon detecting them in the act, to manslaughter—a wrong which is an adjudged provocation to homicide on the part of the husband. If, as in the case at bar, the paramour, in order to save his own life from the consequences of the deadly passions of the husband, excited by the wrong of the former, slays the husband, he can in no sense be ⁴³ said to have been free from fault in bringing about the mortal rencounter; the fatal result, to the contrary, is traceable directly to his own wrong, and he cannot justify his act by an invocation of the doctrine under which one free from fault and unable to retreat is authorized to save his own life by destroying that of another.

It is also a too elementary and familiar principle of law to need discussion or reference to authorities that if one entering upon the commission of a wrongful act has in contemplation that another will or may interfere with his enterprise, arms himself with a deadly weapon with the intent to take the life of that other should it become necessary to save his own in the course of such interference, and who in fact does take the life of the person so interfering in pursuance of such intent, is guilty of murder in the first degree; the intent to kill under the conditions contemplated constituting the “formed design” sufficient and necessary in murder, when the circumstances of the act do not justify the design, and the wrongfulness of the act in which the slayer was engaged at the time the necessity to strike arose precluding all justification of the design.

The application of the foregoing principles to the instructions given by the court to the jury demonstrates that if these instructions have any infirmity, it lies in their being too favorable to the appellant.

The charge requested by the defendant was properly refused: *Goldsmith v. State*, 105 Ala. 8; *Grant v. State*, 97 Ala. 35; *Miller v. State*, 107 Ala. 40.

The court committed no error in its rulings upon the admissibility of evidence.

Affirmed.

HOMICIDE—PLEA OF SELF-DEFENSE—WHEN AVAILABLE. Where a person, being himself without fault, reasonably apprehends death or serious bodily harm to himself unless he kills his assailant, the killing is justifiable. But a person cannot avail himself of a necessity which he has knowingly and willingly brought upon himself: *Carter v. State*, 30 Tex. App. 551; 28 Am. St. Rep. 944, and note. See *Ex parte Mosby*, 31 Tex. 566; 98 Am. Dec. 547. Where defendant sought deceased with a view to provoke a difficulty or bring on a quarrel, and afterward killed deceased, he cannot plead self-defense: *State v. Benham*, 23 Iowa, 154; 92 Am. Dec. 417.

HOMICIDE—PROVOCATION—ADULTERY WITH DEFENDANT'S WIFE.—If a man finds his wife in the act of adultery, and provoked by the wrong done him, and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder, but of manslaughter: *McNeill v. State*, 102 Ala. 121; 48 Am. St. Rep. 17, and note. The same has been held of the killing by a husband on the spot of one taken in the act of adultery with his wife: *State v. Samuel*, 3 Jones, 74; 64 Am. Dec. 596, and note. But the husband must actually know and himself find the deceased in the very act of adultery with his wife, and a mere belief that such is the case will not suffice: Note to *State v. Herrell*, 10 Am. St. Rep. 294.

HOMICIDE—KILLING BY PARAMOUR—SELF-DEFENSE.—The killing of a husband by the paramour of the former's wife is justifiable when the husband deliberately lays a trap for the paramour for the purpose of killing him if he is caught in the guilty act, providing such killing is done by the paramour in defending himself against a deadly assault made by the husband while the paramour and the wife are indulging in illicit intercourse: *Wilkerson v. State*, 91 Ga. 729; 44 Am. St. Rep. 63. See, also, *Reed v. State*, 11 Tex. Ct. App. 509; 40 Am. Rep. 795.

HOMICIDE—EVIDENCE—GOOD CHARACTER OF ACCUSED. Proof of the good character of the accused is admissible in all criminal cases, not only where doubt exists on the other proof, but to create doubt; but an instruction should not be granted which would leave the jury to infer that the good character alone of one accused of murder might, if proved to their satisfaction, raise a reasonable doubt that the killing was done by the defendant with a criminal intent: *Springfield v. State*, 96 Ala. 81; 38 Am. St. Rep. 85, and note. See, also *State v. Cushing*, 14 Wash. 527; 53 Am. St. Rep. 883.

HOMICIDE—EVIDENCE—BAD CHARACTER OF DECEASED.¹ Evidence of bad character of deceased is admissible in trials for murder only when it is shown, *prima facie*, that the accused had been assailed and was honestly seeking to defend himself at the time when the crime was committed: *Gardner v. State*, 90 Ga. 310; 35 Am. St. Rep. 202, and note. See, also, *State v. Vallery*, 47 La. Ann. 182; 49 Am. St. Rep. 363, and note.

THORNTON v. STATE.

[113 ALABAMA, 43.]

CRIMINAL LAW.—EVIDENCE that the day after a murder the witness met the accused, and that he looked frightened, is admissible as a statement of a collective fact.

CRIMINAL LAW—OPINION EVIDENCE—IDENTITY OF PERSON.—A witness in a murder case, who has testified that he knew both the deceased and the accused, and had met them a great many times, is competent to testify that two men passed him on the night of the killing, that he noticed them carefully, and, although, he could not state positively who they were, "in his best opinion" they were the deceased and the accused.

HOMICIDE—EVIDENCE.—If, on a trial for murder, a memorandum book and pencil found at the scene of the killing are shown to have been the property of the accused, they are admissible in evidence as tending to connect the accused with the killing as its guilty agent. The weight to be given such evidence is for the jury to determine.

HOMICIDE—INSTRUCTIONS AS TO CIRCUMSTANTIAL EVIDENCE.—A request to charge the jury in a murder trial that "circumstantial evidence should be just as clear and convincing as where the facts are testified to by eye-witnesses, and in this case should be so clear and convincing as to lead your minds to the conclusion that the defendant is guilty beyond a reasonable doubt," is erroneous and properly refused.

HOMICIDE—INSTRUCTIONS.—A request to charge the jury in a murder case that "the defendant is presumed to be innocent until his guilt is established, and the evidence sufficient to convict should be so clear and convincing as to lead your minds to the conclusion that the accused cannot be guiltless," is erroneous and properly refused.

HOMICIDE — INSTRUCTIONS — EVIDENCE OF GOOD CHARACTER.—A request to charge on a murder trial that "the defendant has the right to offer evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a doubt as to his guilt," is erroneous and properly refused.

Indictment for murder under which the accused was convicted of murder in the first degree and sentenced to imprisonment for life. He appealed.

Gamble & Powell, for the appellant.

W. C. Fitts, attorney general, for the state.

⁴⁶ HARALSON, J. 1. Bargaineer, the sheriff, testified, that as he was going out to the place where Williams was killed, the day following the night he was killed, he met defendant and another negro inside the corporate limits of Greenville, and that *defendant looked frightened when he saw him*. To this last expression, which is italicized, the defendant objected, and excepted to the ruling of the court in admitting it. Such expressions as "she appeared to be healthy"; "the accused appeared to be

mad"; that a person "was sick, had fever, or was pregnant"; "plaintiff seemed to be suffering"; "she was not able to return home"; "she looked bad, and the left wrist of plaintiff looked like the bone had slipped off the joint"; "that the pieces of jugs found in the debris of the burned ginhouse looked like they had been burned"; and such like expressions, have been held to be admissible as statements of what are called collective facts: *South & North Ala. R. R. Co. v. McLendon*, 63 Ala. 266, 275; *Carney v. State*, 79 Ala. 14, 17; *Jenkins v. State*, 82 Ala. 28; *James v. State*, 104 Ala. 20; *Miller v. State*, 107 Ala. 40.

The principle upon which such opinions are admissible as evidence is very fully stated in *Carney v. State*, 79 Ala. 14, ⁴⁷ as follows: "Human emotions and human passions are not, in themselves, physical entities, susceptible of proof, as such. Like the atmosphere, the wind, and some acknowledged forces of nature, they are seen only in the effects they produce. Pleasure, pain, joy, sorrow, peace, restlessness, happiness, misery, friendship, enmity, anger, are of this class. So, tenderness, sympathy, rudeness, harshness, contempt, disgust, the outcrop of emotional status, cannot, in their constitution, be made so far physical facts or entities as to become the subject of intelligent word description. They are proved by what is called opinion evidence. Not the mere unreasoning opinion or arbitrary conclusion of the witness, but his opinion based on experience and observation of the conduct, conversation, and facial expression of others, in similar emotional conditions. Facial expressions and vocal intonation are so legible as that brutes comprehend them; and yet human language has no terms by which they can be dissected, and explained in detail," etc.

Again, as to the admissibility of such evidence, Mr. Wharton says: "The true line of distinction is this: an inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent of the specification of the facts," or a shorthand rendering of them, subject to cross-examination as to the facts on which the inference is based: 1 *Wharton on Evidence*, sec. 510, and authorities cited.

In *McAdory v. State*, 59 Ala. 92, it was held that a witness should not be allowed to say the prisoner "looked downcast," in *Gassenheimer v. State*, 52 Ala. 313, that it was error to allow a witness to state that the prisoner "looked excited," and in *Johnson v. State*, 17 Ala. 618, it was held to be error to allow a witness to state that the prisoner "looked serious." These decisions, as to the admissibility of such evidence, have been departed from,

as we have seen in the later decisions of this court, first above cited. There was no error in admitting the evidence objected to.

2. A witness, Hartley, for the state, testified that two men passed him coming from the direction of Greenville, late in the night in which deceased was killed, and they were, "in his best opinion," the defendant and the deceased. He testified, before the question ⁴⁸ was asked calling for his opinion of their identification, that he could not be positive as to who they were, because he could not see their faces distinctly; that he knew them both and had met them a great many times, and he noticed them carefully that night, and described the size of each. The defendant objected to this evidence, but the court admitted it; and in this there was no error: *Mitchell v. State*, 94 Ala. 68; *Turner v. McFee*, 61 Ala. 468; *Walker v. State*, 58 Ala. 393; 1 *Greenleaf on Evidence*, sec. 440.

3. It was shown that a memorandum book, some time after the killing, was found at the place of the killing, which there was evidence tending to show was defendant's book. It was shown by G. W. Searcy, witness for the state, that there was a string tied around the book when found, and there was a piece of red pencil in it, which was produced and identified by the witness as the one that was in the book when found. Another witness, Lewis Glasgow, testified that he saw defendant in Greenville the day before the killing, at the store of one Lee; that he bought from Lee, at that time, a dozen cedar pencils, all alike; that he gave defendant one of them just like the one found in the book. Here the witness took from his pocket a piece of red pencil, and testified that it was a piece of one of the pencils he had bought of Lee on Christmas eve, when he gave defendant one of them. It was shown that the pencil found in the book, and the one exhibited by the witness as taken from his pocket, were alike in color and appearance, and each had "Dixon, 270" stamped on it. The court, against the objection of defendant, allowed the book and pencil to be introduced in evidence, and in this there was no error. If the book and pencil belonged to defendant, and were found at the scene of the killing, it was competent to show these facts as tending to connect defendant with the killing, as its guilty agent. The weight to be given such evidence was for the determination of the jury: *Young v. State*, 68 Ala. 574; *Hodge v. State*, 97 Ala. 40; 38 *Am. St. Rep.* 145.

4. There was no error in refusing to give charge No. 1 requested by defendant: *Bland v. State*, 75 Ala. 574; *Banks v. State*, 72 Ala. 522.

Charge No. 3 requested by him was properly refused: *Webb v. State*, 106 Ala. 52. And charges 5 and 13 ⁴⁰ have been so repeatedly condemned as improper instructions, it is unnecessary to do more than to say they were properly refused.

5. The objections taken to the verdict rendered are hypercritical. It is unmistakable, and fully responsive to the requirements of the statute: Code 1886, sec. 3739.

No error appearing in the rulings of the court below, its judgment is affirmed.

EVIDENCE—CRIMINAL CASES—IDENTITY.—In criminal cases there must be proof of the corpus delicti, and of the identity of the prisoner. It must be shown that the act itself was done and by the person charged: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346. Where the question of the location of a defendant at a particular time materially affects his guilt or innocence, evidence as to that question is admissible: *State v. Byrd*, 28 S. C. 18; 13 Am. St. Rep. 660.

HOMICIDE—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE. In a case where the evidence as to the defendant's guilt is purely circumstantial the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty": Monographic note to *Burt v. State*, 48 Am. St. Rep. 574. See *Jenkins v. State*, 35 Fla. 737; 48 Am. St. Rep. 267; *Rhodes v. State*, 128 Ind. 189; 25 Am. St. Rep. 429, and note.

HOMICIDE—INSTRUCTIONS—GOOD CHARACTER OF ACCUSED.—As to the weight properly to be given to evidence of the accused's good character, see *Dabney v. State*, 113 Ala. 38; ante, p. 17, and note.

MOORE v. COTTINGHAM.

[113 ALABAMA, 148.]

EXECUTORS AND ADMINISTRATORS—PETITION FOR SALE OF LANDS.—A petition filed in the probate court by administrator de bonis non with the will annexed for the sale of the decedent's lands, which alleges that the estate is owing debts to a certain amount, that the personal property of such estate is insufficient to pay such debts, and that the will of the decedent gives no power to sell his lands for the payment of his debts, is sufficient to confer jurisdiction on the probate court to decree a sale of such lands.

JUDICIAL SALES—COLLATERAL ATTACK.—If a petition filed in the probate court by an administrator asking for the sale of the decedent's land to pay his debts is sufficient to confer jurisdiction on the court to decree a sale of the lands for that purpose, such decree and a sale thereunder are valid as against collateral attacks, notwithstanding irregularities in the supervening proceedings.

JUDICIAL SALES—EVIDENCE OF TITLE UNDER.—If lands have been sold by an administrator for the payment of the

decendent's debts under a decree of the probate court directing him to make title to the purchaser, based upon a petition alleging the necessary jurisdictional facts, such petition, order of sale, and deed made by the administrator are admissible in evidence in favor of the purchaser at such sale in an action of ejectment brought against him by the heirs of the decedent.

JUDICIAL SALES—NOTICE TO HEIRS.—If lands are sold by an administrator to a third person under a decree of the probate court to pay the debts of the decedent, the heirs of the latter are not entitled to notice of the report of the sale made by the administrator, or his application for a confirmation thereof and for an order to make title to the purchaser. Failure to give such notice does not affect the validity of the sale.

Ejectment by the children of Martha A. and Robert B. Moore to recover certain lands, from the appellee, Cottingham, who purchased from one Langston who purchased at probate sale. All the parties claimed through the same source of title, namely, Eleanor Coker, who died testate before the institution of this suit. Plaintiffs claimed as heirs and devisees under the will of said Eleanor Coker, and the appellee or defendant claimed title through certain probate proceedings, instituted by the administrator of said estate, referred to in the opinion which follows. Judgment for the defendant, and plaintiffs appealed.

Ellison, Jones, Mayfield & Brown, for the appellants.

Logan & Van de Graaff, for the appellee.

¹⁰⁰ HARALSON, J. 1. We deem it unnecessary to construe the will of Mrs. Eleanor Coker, to determine whether the plaintiffs took such title under her will as authorizes them to maintain this action, since, admitting the plaintiff's right to sue, under the view we take of the case, they are not entitled to recover in any event.

2. The petition filed in the probate court by the administrator de bonis non with the will annexed in this case, for the sale of the lands of the testator, contained the averments, "that the estate of Eleanor Coker, deceased, is owing debts to the amount of three hundred and fifty dollars, and that the personal property of the estate of said decedent is insufficient for the payment of the debts thereof; and that the will of said decedent gives no power to sell the lands of said estate for the payment of said debts," etc. It describes the lands accurately, gives the names of the devisees of the testator and their residences, states that the last four named of them are minors, under fourteen years old, who reside with the two first named, their parents, in the county of Bibb, state of Alabama, and prays that the lands described be sold for the purpose of paying the debts of said estate, and

that such proceedings, orders, and decrees may be had and made as may be proper and necessary to legally effect the sale of said lands for the purposes aforesaid.

Section 2079 of the Code of 1867, under which the petition was filed (Code 1876, sec. 2447; Code 1886, sec. 2103) provides: "Lands may be sold by the executor or by the administrator with the will annexed, for the payment of debts, when the will gives no power to sell the same for that purpose."

It is too clear to be controverted that this petition, in that it contained the averment that the estate was owing debts to the amount of three hundred and fifty dollars, and that the personal property of the estate was insufficient to pay said indebtedness, stated a jurisdictional ¹⁰¹ ground, such as the statute requires, on which the jurisdiction of the probate court attached, authorizing it to make an order for the sale of the lands for the purposes specified. In *Gilchrist v. Shackelford*, 72 Ala. 13, it was said: "The petition, to be sufficient, must state one of the statutory grounds authorizing a sale"; and again, we have said: "But it is too well settled that the jurisdiction attaches when a petition is filed by a proper party setting forth any of the statutory grounds for a sale": *Goodwin v. Sims*, 86 Ala. 105; 11 Am. St. Rep. 21; *Pettus v. McClannahan*, 52 Ala. 55. The petition in this case is well nigh complete, and certainly avers the statutory ground for the jurisdiction of the court to attach. No one of the several grounds of objection, therefore, which was interposed by plaintiffs against the validity of the petition and its introduction in evidence, nor all of them together, were of any avail; and were properly overruled.

Upon the filing of this petition, the court, proceeding in accordance with the directions of the statute, set a day for the hearing; appointed a guardian ad litem for the minor heirs named in the petition, who accepted the appointment, and discharged his duties; directed notice to be given to the other defendants for ten days before the day set for the hearing; and, on the day so set, the application was heard and passed on, resulting in an order for the sale of said lands for the purpose prayed for. This order, like the petition, is full and specific in the recitals of the grounds upon which it is based, and, if lacking in anything to make it as complete as the most exacting could require, it was as to matters of nonessential detail, never rising higher in such proceedings than mere irregularities. The plaintiffs severally objected to the introduction of the order setting a day for the trial of said application, and to the order of sale, as will appear in the report

of the case, which were severally overruled, and minute entries of the orders were allowed to be read in evidence. Such objections as the ones interposed, in each instance, were unavailing. By an unbroken line of decisions in this court for nearly sixty years, beginning in 1838, with the cases of *Wyman v. Campbell*, 6 Port. 219, 31 Am. Dec. 677, and *Lee v. Campbell*, 6 Port. 249, and coming down to the present time, this court has consistently and firmly held to the rule that when, in a case of this kind, the jurisdiction of the ¹⁶² court attaches upon the petition setting forth a satisfactory ground of sale, the order of sale is not void, although the proceedings may abound in irregularities, such as the ones specified in the objections made by plaintiffs to this petition and order of sale, holding that such proceedings, whenever called in question on collateral attack, on account of such alleged irregularities, are to be wholly disregarded, and the order and judgment of the court upheld. One of our last utterances on the subject, by McClellan, J., in *Stevenson v. Murray*, 87 Ala. 444, is so clear we venture to repeat it: "By the unbroken current of our decisions, a decree based on such a petition will be upheld against collateral attack, even though it should appear that many and gross irregularities should characterize the supervening proceedings. The one exception to the rule is that established by section 2114 of the code, which renders an order of sale void, notwithstanding the jurisdictional sufficiency of the petition, if the probate court has failed to take evidence showing the necessity of sale by depositions as in chancery: *Pettus v. McClannahan*, 52 Ala. 55. But even when this is the case, and there has in fact been such irregularity in this respect as by the terms of the statute would avoid the decree upon a direct assault, yet, when the attack is collateral, either by the validity of the order being drawn in question incidentally in other suits or proceedings, or by a petition to vacate the decree made, in and at a subsequent term of the court which rendered it, the rule is well settled with respect to this, as well as all other judgments and decrees in cases in which jurisdiction has attached, that the matter relied on as avoiding the adjudication must appear affirmatively on the face of the record: *Freeman on Judgments*, sec. 98; *Johnston v. Glascock*, 2 Ala. 522; *Pettus v. McClannahan*, 52 Ala. 57, 59."

In addition to the cases already cited, we append the following, among many, sustaining the doctrine announced: *Doe ex dem. Duval v. McLoskey*, 1 Ala. 708; *Lightfoot v. Lewis*, 1 Ala. 475; *Duval v. Planters etc. Bank*, 10 Ala. 636; *Field v. Goldsby*, 28 Ala. 218; 65 Am. Dec. 341; *Matheson v. Hearin*, 29 Ala. 210;

King v. Kent, 29 Ala. 542; Satcher v. Satcher, 41 Ala. 26; 91 Am. Dec. 498; Robertson v. Bradford, 70 Ala. 385; May v. Marks, 74 Ala. 253; Watts v. Frazer, 80 Ala. 186; Lyons v. Hammer, 84 Ala. 197; 5 Am. St. Rep. 363; Goodwin v. Sims, 86 ^{1st} Ala. 102; 11 Am. St. Rep. 21; Cotton v. Holloway, 96 Ala. 544; Thompson v. Boewell, 97 Ala. 570; Smith v. Brannon, 99 Ala. 445; Kent v. Mansel, 101 Ala. 334.

3. The plaintiffs objected to the report of the sale by the administrator, and to its confirmation by the court, on grounds substantially the same in each instance, and to the introduction of the two deeds, one from the administrator to the purchaser, Langston, and the other, afterward executed and delivered by Langston and wife to defendant, which several grounds will be set out in the report of the case. There was no error in the admission of these several items of evidence.

The administrator was not the purchaser, but a third person was; and the plaintiffs were entitled to no notice of the report and application by the administrator for a confirmation and order to make title: Dugger v. Tayloe, 60 Ala. 504; Ligon v. Ligon, 84 Ala. 555; Bogart v. Bell, 112 Ala. 412.

We have been invited, in a lengthy and vigorous argument by plaintiff's counsel, to review our former rulings and overrule them, as being wrong in principle. This we are not permitted to do without destroying the ancient landmarks of the law, impairing confidence in judicial decisions and unsettling a rule which we regard as sound in principle, and on which titles to property of untold value depend. The question must be regarded, so far as we can make it, as finally settled in this court.

There was no error in giving the general charge for the defendant. It is, therefore, unnecessary to consider other assignments of error.

Affirmed.

EXECUTORS AND ADMINISTRATORS—PETITION FOR SALE OF LANDS—VALIDITY OF SALE UPON COLLATERAL ATTACK.—In proceedings in a probate court to sell real estate for the payment of a decedent's debts, the court must be satisfied before making an order of sale that there are unpaid debts properly chargeable upon the real estate of the decedent, and that the real estate described in the petition is bound by the lien of such debts, and that it is necessary to have recourse to the land to pay them, otherwise the sale is unauthorized and subject to collateral attack: Smith v. Wildman, 178 Pa. St. 245; 36 Am. St. Rep. 760. But, in the absence of fraud or collusion, the judicial determination by a probate court that there are debts against an estate over which it has jurisdiction, and that a sale of land is necessary, is conclusive against all who are parties to that proceeding, and upon a chancery or other court,

so far as the rights of purchasers are concerned: *Cobb v. Garner*, 165 Ala. 467; 53 Am. St. Rep. 136, and note. See, also, *Lynne v. Stanford*, 82 Tex. 58; 27 Am. St. Rep. 852, and note.

EXECUTORS AND ADMINISTRATORS—SALES BY—EVIDENCE OF TITLE UNDER.—One who claims under an administrator's deed need only produce the deed, order of sale, and order of court approving the sale, to raise the presumption that the requisite antecedent steps for the sale were taken: *Price v. Springfield etc. Assn.*, 101 Mo. 107; 20 Am. St. Rep. 595. See, also, *Sherwood v. Barber*, 105 Mo. 472; 24 Am. St. Rep. 399.

JUDICIAL SALES—EXECUTORS AND ADMINISTRATORS—CONFIRMATION—NOTICE TO HEIRS.—The judgment of the probate court confirming an adjourned sale of real estate made by an administrator is final and conclusive, until set aside in a direct proceeding, and cannot be collaterally attacked: *Noland v. Barrett*, 122 Mo. 181; 43 Am. St. Rep. 572, and note. But an administrator's sale ordered and confirmed without notice to the heir is void: *Mitchell v. Bowen*, 8 Ind. 197; 65 Am. Dec. 758, and note. If the heirs are made parties to the proceeding, notice to them will be presumed: *Mitchell v. Bowen*, 8 Ind. 197; 65 Am. Dec. 758. See, also, *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49, and note; *Wilson v. White*, 109 N. Y. 59; 4 Am. St. Rep. 420.

ELYTON LAND COMPANY v. DOWDELL.

[113 ALABAMA, 177.]

CORPORATIONS—RIGHT TO TAKE STOCK IN ANOTHER CORPORATION.—A corporation authorized by its charter "to take stock" in other corporations has no power to effect its own dissolution by sale of all of its assets, and to take the stock of another corporation in payment therefor and for distribution to its shareholders, or to any shareholder, without his consent and contrary to his preference, as he cannot be required arbitrarily to accept anything but money.

CORPORATIONS—SALE OF STOCK TO ANOTHER CORPORATION—RIGHT OF STOCKHOLDER TO ANNUL.—A sale of all its assets and stock by one corporation to another, the purchase price being stock in the latter, may be set aside and annulled by a stockholder in the former corporation who has not assented to, participated in, nor ratified such sale.

A. T. London, and Tompkins & Troy, for the appellants.

G. Macdonald and Smith & Weatherby, for the appellee.

¹⁸² **COLEMAN, J.** The complainant, a stockholder owning five shares in the Elyton Land Company, a corporation, filed the present bill for the purpose of annulling and setting aside a sale and conveyance of its property assets to the Elyton Company, a corporation, and to set aside and annul a mortgage executed by the Elyton Company to the Maryland Trust Company, as trustee, to secure the payment of certain bonds issued by the Elyton Company

To the bill the respondent filed a plea and answer in support of the plea, to which the complainant excepted as being insufficient. The court sustained the exception, and this ruling is the only error assigned. In December, 1870, the Elyton Land Company was incorporated, for the purpose of "buying lands and selling lots with the view to the location, laying off, and effecting the building of a city at or near Elyton" in Jefferson county, Alabama. Its capital stock was two hundred thousand dollars, divided into two thousand shares of one hundred dollars each. In February, 1889, the charter of the Elyton Land Company, by act of the legislature, was amended and confirmed, by which its corporate existence was continued with all its rights, privileges, and franchises for fifty years, and during such continued existence it was authorized and empowered "to borrow and lend money, to guarantee indebtedness for persons and corporations, to build, own, rent, lease, and otherwise lawfully use buildings of every kind and description, to issue bonds in amount not to exceed five millions of dollars, . . . and to take stock in other corporations." ¹⁸³ Prior to the ninth day of November, 1887, it was ascertained that the Elyton Land Company had leased and owned and had in possession, as profits, promissory notes for lots and lands sold amounting to over three million nine hundred thousand dollars, estimated to be worth not less than three and a half millions of dollars, and, at a meeting of the directors, it was resolved that two millions four hundred thousand dollars of said notes be distributed in kind as a dividend to the shareholders. By resolution adopted on the ninth day of November, 1887, so much of the former resolution as provided for a division in kind of said promissory notes, was rescinded, and in lieu thereof it was resolved that the dividend should be in the form of a certificate for twelve hundred dollars for each share of stock. By the resolution, and on the face of the certificates issued in pursuance thereof, it was provided that the dividend certificate should be paid at the option of the company in money or its bonds, bearing interest at the rate of six per cent, "which may hereafter be authorized to be issued." The certificates were issued to the shareholders, including complainant, and subsequently were paid for in the bonds of the company, as provided in the resolution and in the certificate. These bonds are denominated "dividend trust bonds," and provided that the holder is entitled to the security derived from setting apart of two million four hundred thousand dollars of notes given for purchase money of land and constituting a first lien thereon. The complainant, it seems, dis-

posed of her bonds either in the market or some other way. Her rights as such bondholder are not involved in this litigation, but only her rights as a shareholder. At a meeting of the board of directors of the Elyton Land Company held November 15, 1888, it was "Resolved, that no dividends in money shall be paid the stockholders until all of its indebtedness, including the entire principal of dividend trust bonds, is paid and discharged." Payments were made upon the dividend trust bonds until the number and amounts were reduced from two million four hundred thousand dollars to one million seven hundred and ninety-six thousand dollars. The acts and proceedings of the Elyton Land Company in these matters are not assailed by complainant's bill.

This seems to have been the relative situation of the parties when the financial depression came on, so greatly affecting the value of securities and property. On the ¹⁸⁴10th of February, 1893, "The Elyton Company" was incorporated, and, we conclude from the pleadings, the incorporators consisted, if not entirely, at least of the controlling shareholders in the Elyton Land Company. Its capital stock was fixed at ten millions of dollars, divided into shares of one hundred dollars. By its charter the corporation was authorized "to buy, sell, and own real, personal, and mixed property, to build, own, and operate furnaces to manufacture iron, steel, and industrial establishments or manufacturies of all other kinds whatsoever, to build, own, and operate railroads, etc., to take, own, and hold the stock of any other corporation organized for any of the purposes herein above mentioned," etc. It will be seen that the Elyton Company was authorized to engage in many enterprises not included in or contemplated by the original or amended charter of the Elyton Land Company.

The fourth section of the act of incorporation provided: "That said corporation may purchase the property, real, personal and mixed of the Elyton Land Company; provided that such sale is made under the laws now in force, *and nothing in this act shall be construed to impair or in any manner whatsoever to affect the rights of any stockholder of the Elyton Land Company,*" etc. We italicise the proviso. By the seventh section, the corporation was authorized to mortgage its assets and property to secure any indebtedness. The Elyton Company was duly organized under the act of incorporation. At a regular meeting of the stockholders of The Elyton Land Company, a majority of the stockholders, owning three-fourths of the stock, resolved to sell its entire assets to The Elyton Company, the terms of the sale being that the

Elyton Company should pay all the liabilities of the Elyton Land Company and issue two million five hundred thousand dollars of its bonds bearing five per cent interest, payable in gold, one million seven hundred and ninety-six thousand dollars of which were to be issued to the holders of the dividend trust bonds, in payment thereof, and in addition issue ten shares of its stock to each holder of one share of stock in the Elyton Land Company. The bonds of the Elyton Company matured after thirty years, a later period than the maturity of the dividend trust bonds. To effect the arrangement, the Maryland Trust Company was selected as trustee.

The Elyton Land Company sold and transferred all its property of every kind to the Elyton Company. The ¹⁸⁵⁵ latter issued its bonds, two million five hundred thousand dollars, and executed a mortgage to the Maryland Trust Company, upon all the property purchased from the Elyton Land Company to secure these bonds. The stock was also issued and delivered to such of the stockholders as were willing to receive it, in exchange of the stock held by them in the Elyton Land Company. No other arrangement or provision was made to pay the shareholder in the Elyton Land Company for his share, except to accept the stock in the Elyton Company. It is alleged in the bill and not traversed in the plea that the complainant was not present, was not represented, and had no notice of the meeting of the directors of the Elyton Land Company at which it was resolved to sell its property to the Elyton Company, and to authorize the latter to execute a mortgage to secure its bonds and issue stock.

Immediately after the consummation of the transaction between the two corporations, complainant filed her bill.

If, in the foregoing summary of the facts and transactions, there are any omissions, the appellant has been given the advantage. We do not doubt the right of complainant to relief, so far as the defense is rested upon the plea. In the first place, by its charter, the Elyton Company was authorized to purchase the property of the Elyton Land Company, "provided that such sale is made under the laws now in force, and nothing in this act shall be construed to impair, or in any manner whatsoever to affect the rights of any stockholder of the Elyton Land Company." At the time of the sale and transfer of its property, the Elyton Land Company was solvent, a going corporation, and its stock was very valuable. Its duties and powers were fixed by its charter, and its business evidently managed with great skill and success, for the benefit of its shareholders. The Elyton

Company by its charter was authorized to engage in many enterprises not within the scope of the powers of the Elyton Land Company. A shareholder in the latter might not be willing to become a shareholder in the other. By the sale and transfer of the property, the Elyton Land Company divested itself of all its property and capacity to continue the business for which it was organized. If the sale stands, the owner of stock in the Elyton Land Company is compelled to accept the stock of the new corporation, or hold stock in a corporation ¹⁸⁶ without capital assets. We lay no stress on the argument that, by its amended charter, the Elyton Land Company is authorized "to take stock" in other corporations. It was certainly never intended by that provision to authorize the Elyton Land Company to effect its own dissolution by a sale of all its assets, and "take the stock" of another company in payment for distribution to the shareholders or any shareholder without the consent and contrary to the preference of the shareholder. But it is too clear for argument that the two million shares of stock of the Elyton Company were to be issued to the Elyton Land Company, as a mere conduit to the shareholder of the Elyton Land Company, and not to be held and owned as capital assets of the Elyton Land Company. It may be that a private business corporation may sell out its entire property by and with the consent of less than all its stockholders, for the purposes of paying its debts, or for the purposes of dissolution and settlement, but, when this is the purpose, it must be clearly understood, and the terms and conditions of the sale must be within the contractual relations between the corporation and its creditors or shareholders. There can be no presumption that a creditor or stockholder of the dissolved corporation will accept in payment of his demand anything but money. He cannot be required to do so arbitrarily. While the plea shows the consent and ratification of the complainant to the issue of the certificate of twelve hundred dollars to the shareholder for each share of stock, and its subsequent payment by a dividend bond, it does not show consent or ratification of the sale of the property and the execution of the mortgage. It is manifest that the whole plan of organization of the Elyton Company was in the interest of those who held the dividend bonds, without reference to the interest of the stockholder. These bonds at first maturing within three or four years were a lien or charge only upon two million four hundred thousand dollars of its promissory notes, leaving all its other property unencumbered. By the arrangement, the dividend bonds, amounting to only one million

seven hundred and ninety-six thousand dollars, secured by a lien upon two million four hundred thousand dollars of notes, were converted into gold bonds, running thirty years, and were secured by a mortgage upon all the property owned by the Elyton Land Company. The bonded indebtedness was increased over a half million dollars. The Elyton Company, ¹⁸⁷ from the pleading, did not own a dollar of capital other than that acquired by the purchase from the Elyton Land Company.

The facts set up in the plea do not present an estoppel as to the complainant, whatever may be their effect upon the dividend bondholders, and the other stockholders, who aided in carrying out the arrangement, or have since ratified it: *Kean v. Johnson*, 9 N. J. Eq. 401; *New Orleans etc. R. R. Co. v. Harris*, 27 Miss. 517.

The decree of the city court is affirmed.

CORPORATIONS—POWER TO INVEST IN STOCK OF OTHER CORPORATIONS—RIGHTS OF STOCKHOLDERS.—Unless a corporation is by its charter or by some general law expressly authorized to acquire stock in other corporations, any transaction, the chief object of which is the acquisition of such stock, is ultra vires: Monographic note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 136, on the right of one corporation to acquire stock in another: *Commercial Fire Ins. Co. v. Board of Revenue*, 99 Ala. 1; 42 Am. St. Rep. 17, and note. Though one corporation is authorized to purchase stock in another, it cannot by such purchase obtain a greater right than would have been obtained by a purchase by a natural person, and, upon acquiring a majority of the stock, it occupies toward the minority stockholders the same relation of trust, and the same duty to respect the trust, as must have arisen had the purchase been by a natural person: *Farmers' etc. Co. v. New York etc. Ry. Co.*, 150 N. Y. 410; 55 Am. St. Rep. 689, and note. Moreover, any stockholder may dissent from any proposition looking to the use of the funds or credit of the corporation in which he holds stock for the acquisition of stock in another corporation: Monographic note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 136. See *Holmes etc. Co. v. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448.

COLEMAN v. ROBERTS.

[113 ALABAMA, 323.]

CONTEMPTS—POWER OF JUSTICES TO PUNISH FOR. At common law and under the statute a justice of the peace has power to punish for contempts committed in his presence while sitting officially, the only difference being that the statute fixes a limitation upon the amount of the punishment.

JUSTICES OF THE PEACE—PRIVATE ACTION AGAINST FOR JUDICIAL ACTS.—Neither justices of the peace nor the sureties on their official bonds are subject to private actions for errors of judgment on the part of such justices when acting judicially, nor for corrupt abuse of official authority.

CONTEMPTS—POWER OF JUSTICES TO PUNISH FOR.—All persons present in a court of a justice of the peace while he is acting judicially, whether in obedience to process or voluntarily as mere bystanders or spectators, are subject to the jurisdiction of the court in so far as is necessary for the preservation of its order and decorum, and if any one of them does any act tending to disturb or obstruct the administration of justice, or to interrupt the due course of the trial, or to impair the respect due the court, he may be thereupon adjudged guilty of contempt of court and forthwith punished without the issue of process or any further examination or proof.

CONTEMPT—FAILURE TO ENTER JUDGMENT—COLLATERAL ATTACK.—If a justice of the peace finds a bystander guilty of contempt during judicial proceedings, and thereupon sentences him, issues a warrant of commitment, and the offender is placed in custody, the fact that such judgment or sentence is not entered on the docket of the court prior to adjournment is a mere error or irregularity not affecting the validity of the judgment, when drawn into question collaterally.

Action against Coleman and his sureties on his official bond as justice of the peace to recover for an alleged unlawful imprisonment of one Roberts, for an alleged contempt committed by the latter while the former was acting in his judicial capacity. One Hicks was being tried before Coleman for an assault and battery, and upon the close of the evidence, the latter spoke as if he intended to fine Hicks, when Roberts, who was present in court and a bondsman for Hicks, arose and remarked that, "I know two men at my house who saw the affair and stated as the defendant's witness swore." Coleman asked Roberts to give the names of such witnesses and upon his persistent refusal to give their names, he found him guilty of contempt of court and sentenced him to pay a fine of six dollars and six hours imprisonment. In the present action Roberts recovered judgment and Coleman and his sureties appealed.

W. A. Walker and W. R. Houghton, for the appellants.

B. W. John, L. C. Dickey, and J. A. Mitchell, for the appellee.

³²⁷ BRICKELL, C. J. The assignments of error are numerous, but there is a single question of materiality and importance to the rights of the parties, involved; and that question depends upon facts which may be accepted in the phase in which the testimony of either party presents them. The defendant was a notary public ³²⁸ of the appointment of the governor, having and exercising the same jurisdiction as a justice of the peace within the ward or precinct for which he was appointed. While holding court, at a proper time and place, one Whit Hicks was brought before him charged with having committed an assault and battery, an offense within the jurisdiction of the defendant as justice. During the trial, the defendant adjudged that the plaintiff, who was present as a bystander or spectator, was guilty of conduct constituting a contempt, and sentenced him to pay a fine of six dollars, and to suffer six hours' imprisonment in the county jail. The sentence and consequent imprisonment is the gravamen of the complaint.

"The power to punish contempts by fine and imprisonment is incident to all courts of justice; and without such power the administration of the law would be in continual danger of being thwarted by the lawless. The power seems to be as ancient as courts themselves": *Easton v. State*, 39 Ala. 551; 87 Am. Dec. 49. With as much of precision as the nature of the subject will probably admit, the code enumerates the acts or conduct constituting contempts which may be punished summarily, and of these acts or conduct, there is no one, probably, which was not at common law deemed a contempt: Code 1886, secs. 648-650. Embraced in the enumeration are, "disrespectful, contemptuous, or insolent behavior in court, tending, in any wise, to diminish or impair the respect due to judicial tribunals or to interrupt the due course of trial": and "a breach of the peace, boisterous conduct, violent disturbance, or any other act calculated to disturb or obstruct the administration of justice, committed in the presence of the court, or so near thereto as to have that effect."

The words of the statute are broad and general, comprehending all courts, whether they be of the class termed of superior, or of inferior, jurisdiction. It was well settled at common law that a justice of the peace had power to punish contempts committed in his presence, while sitting officially: *Cooley on Torts*, 423; *Murfree on Justices*, sec. 84. Though this was the known principle of the common law, and broad and comprehensive as were the words of the statute defining contempts, the code, in express terms, vests the justice with authority "to punish for

contempt by fine ³²⁹ as high as six dollars, and by imprisonment not exceeding six hours": Code 1886, sec. 840.

The doctrine has become so firmly settled as to have passed into a truism that an action will not lie against a judicial officer, the highest or lowest, keeping within the sphere of his jurisdiction, by one supposing himself aggrieved by his judicial action: Mechem on Public Officers, sec. 619, et seq; Cooley on Torts, 403 et seq; *Busteed v. Parsons*, 54 Ala. 393; 25 Am. Rep. 688; *Irion v. Lewis*, 56 Ala. 190; *Woodruff v. Stewart*, 63 Ala. 206; *Heard v. Harris*, 68 Ala. 43. Averments of malice, or of corruption in the exercise of jurisdiction, or of authority, work no change in the operation of the principle. "Malice and error combined, nor either separately, will furnish a private cause of action against a judge": *Irion v. Lewis*, 56 Ala. 190; *Woodruff v. Stewart*, 63 Ala. 206. The true theory and reason of the doctrine is stated with clearness by Judge Cooley: "Whenever the state confers judicial powers upon an individual, it confers therewith full immunity from private suits. In effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in a faithful discharge of them, he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages": Cooley on Torts, 408. There has been, not infrequently, much of objection that the doctrine has a tendency to promote the exercise of judicial power arbitrarily or capriciously, and may shield unscrupulous, corrupt men in judicial offices. This may be true to some extent, but, if true and individual injury results, it is only an instance of the merger of individual wrong in the higher wrong to the state, and must be redressed by the higher remedies the state can pursue against the unjust judge: *Busteed v. Parsons*, 54 Ala. 393; 25 Am. Rep. 688.

In *Kelly v. Moore*, 51 Ala. 364, it was decided that a justice of the peace and the sureties on his official bond ³³⁰ were liable for an abuse by the justice of the authority of his office in causing the arrest and imprisonment of the plaintiff "without reason or probable cause." The decision was rested on the statute declaring the legal effect of official bonds, and among other causes

declares them obligatory on the principal and sureties, "for the use of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law": Code 1886, sec. 273. The judgment was by default, and the material, controlling inquiry was, whether the complaint contained a substantial cause of action as against all the defendants jointly, for then, as now, the statute prohibited the reversal of judgments because of any matter not previously objected to, if the complaint contained a substantial cause of action: Code 1886, sec. 2835. The construction of the complaint was, that the wrong complained of was not committed by the justice while in the exercise of the jurisdiction the law conferred. The language of the court is: "It must be observed the wrong complained of is not an erroneous or corrupt exercise by the justice of the jurisdiction the law confers. It is an abuse of the authority of his office; a pretended, not a real, exercise of his jurisdiction. 'Under color of his office,' he arrests and imprisons the plaintiff. This was a misdemeanor at common law, and a tort for which an action could have been maintained against the justice. The sureties on his official bond would not, at common law, have been liable for this tort. The malfeasance of their principal, of which misfeasance could not also be predicated, was not within the scope of their obligation: *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183. This was deemed a defect in the common law, and, to cure it, the statute now extends the liability of sureties on official bonds to injuries from wrongful acts done by the officer under color of his office, as well as to the nonperformance, or negligent performance of official duty. The complaint avers the wrong, as we have stated, the official character of McGovern, and the execution of an official bond, with the other defendants as sureties. However inartificial these averments may be, they must, after judgment by default, be deemed to disclose a substantial ³⁸¹ cause of action against all the defendants jointly." Whether the construction of the complaint was, or was not erroneous, is not now of importance. The decision cannot be regarded, and must not be regarded, as infringing upon, or modifying the general principle that judicial officers are not liable to civil suits for a wrongful or for a corrupt abuse of the authority with which they are invested. The later and more thoroughly considered case, *Irion v. Lewis*, 56 Ala. 190 (which was followed in *Harris v. Heard*, 68 Ala. 43), affirms the doctrine broadly, that justices of the peace

are not subject to private actions for errors of judgment when acting judicially, nor for a corrupt abuse of official authority, and that the consequence or effect of requiring from them official bonds is not to extend their liability. This we regard as the sound exposition of the statute.

In all cases of this character, inquiry is confined within a narrow compass. It is not whether there is error, or irregularity, nor what were the motives with which the act complained of was done. It is, whether the act was an exercise of the jurisdiction, or of the authority, the law confers. If it be, immunity from suit by a private person attaches. The jurisdiction of the defendant as justice, was plenary. The acts deemed contemptuous, were committed in his presence, while sitting as a court, and in the exercise of the jurisdiction with which he was invested. It is not of consequence that the plaintiff was not present in obedience to process issued to him. All who were present, whether in obedience to process or voluntarily as mere bystanders or spectators, were subject to the jurisdiction of the court, in so far as was necessary for the preservation of its order and decorum. They were bound to abstain from any and every act tending to disturb or obstruct the administration of justice, or to interrupt the due course of trial, or to impair the respect due to judicial tribunals. The interruption of the court by the plaintiff, however respectful may have been his words or tone of voice, was unseemly and inexcusable, unless he intended to further the due administration of the law by information that there were other witnesses accessible, from whom material evidence could be obtained. If courts, high or low, are subject to such intrusions, and are powerless to prevent ³³² them, the administration of justice would be delayed, and the courts at the mercy of the garrulous intermeddler.

In *Easton v. State*, 39 Ala. 551; 87 Am. Dec. 49; it is said: "It is settled by an unbroken chain of authorities that, when the contempt is committed in the face of the court, 'the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.'" And it is further said: "Another principle seems to be equally well settled, to wit, that a judgment or sentence for contempt is valid, without any recital of the conduct or facts which constitute the contempt." The contempt having been committed in the presence of the court, there was no necessity, as there would have been no propriety, in the issue of process for the arrest of the offender, so long as he re-

mained in the court. The court had the jurisdiction of his person, which would have attached if he had been detained by the most formal process.

Whether the justice had entered the judgment and sentence on his docket, prior to the adjournment of the court, is a fact about which there is a conflict in the evidence. But that he had issued the warrant of commitment, that was in the hands of the officer, and the plaintiff was in custody, are facts uncontroverted. The judgment and sentence, if practicable, should have been entered on the docket before the adjournment. Neglect to enter it, at most, would constitute mere error or irregularity in the exercise of jurisdiction, not affecting the validity of the judgment when drawn in question collaterally. It was the rendition of the judgment—the oral rendition in the presence of the offender—which was judicial; the entry of it on the docket was merely ministerial: *Murfree on Justices*, secs. 557, et seq. A justice's court is not a court of record; the only memorial of his proceedings he is required to keep is "a docket of all cases brought before him, in which must be entered the names of the parties, the return of the officer, and the entry of the judgment, specifying the amount of the same, and the day of its rendition": *Code 1886*, sec. 841. There is no time prescribed within which the entries on the docket are to be made. Doubtless it is the better practice to make them contemporaneously with the acts to which they refer. But if they are not so made, and are ³³³ made within a reasonable time, the ministerial duty is discharged, and invalidity cannot be imputed to the judicial action of which they are the memorial. If the entries are ambiguous, of doubtful import, they must, if they will bear it, receive that interpretation which will support the proceedings; and when they import a judgment, they must be taken in connection with any process the justice may have issued in execution of the judgment. The entry on the docket may import only that a fine was imposed as the punishment for the contempt; before the making of the entry, a warrant of commitment had issued and the offender was in custody. The warrant would have authorized the amendment of the judgment as entered on the docket, if amendment had been necessary; but it was not necessary when the entry and warrant are read in connection. Justices of the peace "are not legal experts—they are not masters of legal form"; and it is enough that by the entries on their dockets and the process they issue their jurisdiction of person and subject matter is disclosed.

The city court erred in the instruction given the jury at the

instance of the plaintiff, and in the refusal of the general affirmative instruction requested by the defendants. We do not deem it necessary to pass on any other of the assignments of error. If there should be another trial of the case, what has been said is a sufficient guidance for its conduct.

Reversed and remanded.

CONTEMPT OF COURT—POWER OF JUSTICE OF PEACE TO PUNISH FOR.—The power of inferior courts, that is, courts not of record, to punish contempts independently of statutory authority is denied in some cases: *Rhinehart v. Lance*, 33 N. J. L. 311; 39 Am. Rep. 592; *Albright v. Lapp*, 26 Pa. St. 99; 67 Am. Dec. 402. But the sounder opinion is that this power of punishing contempts is possessed equally by all courts, whether of superior or inferior grade, and whether of record or not. The foundation of the power is the obvious necessity that a court should have some summary means of self-protection from insult, disorder, and disobedience of its process. And this necessity is just as strong in inferior courts as in those of higher jurisdiction: Monographic note to *Clark v. People*, 12 Am. Dec. 181. See *Ex parte Robinson*, 27 Tex. App. 628; 11 Am. St. Rep. 207.

JUSTICE OF PEACE—JUDICIAL ERRORS—LIABILITY FOR, IN CIVIL ACTION.—A justice of the peace, acting in good faith and having jurisdiction of the person and of the subject matter, is not civilly liable in damages for error in judgment: *Brooks v. Mangan*, 86 Mich. 576; 24 Am. St. Rep. 137. A justice of the peace is not liable in an action at law for acts done judicially, and within his jurisdiction, unless he has acted from impure or corrupt motives: *Gregory v. Brown*, 4 Bibb, 28; 7 Am. Dec. 731; *Jordan v. Hanson*, 49 N. H. 199; 6 Am. Rep. 508; *Wertheimer v. Howard*, 80 Mo. 420; 77 Am. Dec. 623.

JUSTICES OF PEACE—JUDGMENTS—COLLATERAL ATTACK.—Judgments of justices' courts cannot be collaterally attacked as void, although the record does not show all the facts necessary to confer jurisdiction: *Williams v. Ball*, 51 Tex. 603; 36 Am. Rep. 730; *Billings v. Russell*, 23 Pa. St. 189; 62 Am. Dec. 330; *Wilkerson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803, and note.

OSBORNE v. COOPER.

[113 ALABAMA, 405.]

HUSBAND AND WIFE—CONVEYANCES BETWEEN.—Under a statute authorizing a husband and wife to contract with each other, she may make a valid conveyance of her separate estate directly to him for a valuable consideration in the absence of an abuse of the confidential relations between them. A statute requiring the husband to join in conveyances or encumbrances of the wife's separate estate applies only to conveyances by the wife to a third person other than her husband.

HUSBAND AND WIFE—CONVEYANCES BETWEEN—ESTOPPEL OF WIFE TO DENY CONSIDERATION.—If a wife conveys her separate estate directly to her husband for a valuable consideration without disclosing their relationship, or an abuse of the confidential relations between them, and afterward joins her husband in a mortgage of such property to an innocent third person,

she is estopped from alleging the invalidity of her deed to her husband or want of consideration therefor.

HUSBAND AND WIFE—MORTGAGE OF WIFE'S SEPARATE ESTATE.—A mortgage on her separate real estate made by a wife to secure her husband's debt is void under a statute providing that "the wife shall not directly or indirectly become surety for her husband."

Walker, Porter & Walker, for the appellants.

Nesmith & Nesmith, McGuire & Collier, and W. C. Fitts, for the appellee.

⁴⁰⁹ HARALSON, J. Section 2707 of the code of 1876 provided that "the property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them jointly, by instrument of writing, attested by two witnesses." The uniform construction of that statute was, that a deed to the real estate of the wife held by her under the statute was inoperative and void as to her, if not executed in conformity to the requirements of the statute: *Blythe v. Dargin*, 68 Ala. 370; *Trawick v. Davis*, 85 Ala. 343; *Davidson v. Cox*, 112 Ala. 510.

The same provision as to the conveyance of the wife's real estate was preserved in substance, in the later statute on the subject (Code 1886, sec. 2348), where it is said that the wife "cannot alienate her lands, or any interest therein without the assent and concurrence of the husband, the assent and concurrence of the husband to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land."

Under the former law, in a case (*Trawick v. Davis*, 85 Ala. 343), where the wife had conveyed land by deed direct to the husband, and the deed was assailed by a daughter of the wife after her decease, as being inoperative to convey her title, this court, in construction of the statute, held that a conveyance of property by a married woman to her husband, in form of a deed, cannot operate as a conveyance, since the wife's property could only be conveyed by the joint deed of husband and wife, and the husband could not be both grantor and grantee in the same deed: Citing *Falk v. Hecht*, 75 Ala. 293; *Hammond v. Thompson*, 56 Ala. 589.

Upon high authority, it is held that where the deed of a married woman of her statutory separate estate fails from the non-concurrence of her husband, it is ineffectual for all purposes, and cannot be relied on as an estoppel or ground of recovery in any subsequent controversy: 2 Herman on Estoppel, sec. 58. In *Merriam v. Boston etc. R. R. Co.*, 117 Mass. 241, 244, it was said, that "A court of equity has no more jurisdiction than a

court of law to recognize and give effect to instruments which, by statute, are inoperative." To the same effect are *Townsley v. Chapin*, 12 Allen, 476; *Lowell v. Daniels*, 2 Gray, 161; 61 Am. Dec. 448; *Glidden v. Strupler*, 52 Pa. St. 400; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164. The same doctrine is maintained by our own decisions: *Harden v. Darwin*, 77 Ala. 473; *Armstrong v. Connor*, 86 Ala. 350; *Lansden v. Bone*, 90 Ala. 446; *Vincent v. Walker*, 93 Ala. 168; *Jones v. Reese*, 65 Ala. 140.

On the 4th of February, 1889, the appellee, Mary A. Cooper, executed and delivered to her husband, A. P. Cooper, on the recited consideration of three thousand dollars, a deed of conveyance with covenants of warranty to the one hundred and twenty acres of land first described in section 2 of the bill. If this case rested, therefore, on the provisions of said section 2348 of the code, the deed having been made by the wife directly to the husband would be void, and she would not be estopped to allege its invalidity in equity. But, the present married woman's law contains a provision which the former law did not contain, viz: "The husband and wife may contract with each other, but all contracts into which they enter are subject to the rules of law as to contracts by and between persons standing in confidential relations, but the wife shall not, directly or indirectly, become surety for the husband": Code 1886, sec. 2349.

A sale of land by the wife to the husband is certainly a contract between them, and such a contract, when not within the prohibitory provisions of said section of the code, is one clearly within its authorization, and under it, the wife may now—as she could not do under the former married woman's law—sell and convey her statutory real estate, on an adequate, fair consideration, directly to her husband; and, construing this and the preceding section together, as is proper, we must hold that the inhibition of said section 2348 against the sale of the real estate (or against mortgaging it, as the recent amendment of that section also embraces) applies to sales or mortgages by the wife to a third person, other than her husband.

There is an absence of evidence to show that there was any abuse of confidential relations between husband ⁴¹¹ and wife, on the part of the husband, to procure the execution of this deed. He was negotiating through J. S. McEachin to borrow eight hundred dollars, and he was advised by said McEachin that, to procure the loan, this deed ought to be made, and the wife, to enable him to effect the loan, and give proper security, executed the deed at the request of her husband. Nearly a year afterward, on the

1st of January, 1890, she joined her husband in a mortgage of these and other lands to appellants to secure a loan at the latter date, negotiated by said McEachin for the husband, to be made to him by appellants. No fraud or undue influence appear to have been exercised over her by anyone to procure the execution of said deed.

As between her and her husband, it has been held that she would not be estopped by the recitals of the consideration in the deed from showing that there was in fact no consideration, and, on that account, in a proceeding in equity against him for the purpose, she might have the same set aside and held for naught, as a cloud on her title, and this whether she was in or out of possession: *Vincent v. Walker*,: 93 Ala. 168; *Armstrong v. Connor*, 86 Ala. 350.

But the question is presented, whether, after having conveyed the land to her husband by deed directly to him, upon a valuable consideration expressed therein, she may avoid the same when it was conveyed, afterward, by her husband to an innocent bona fide purchaser for value, such as appellants claim to have been. The deed of Mrs. Cooper to her husband to the lands therein mentioned did not disclose the fact that she was the wife of the grantee. It was executed, as we have stated, on the 4th of February, 1889; and afterward, on the 1st of January, 1890, for a loan of eight hundred dollars to her husband by the appellants, he made a mortgage, joined in by his wife, of these and other lands of his and hers to secure the payment of the loan. The appellants did not know, as the evidence tends most strongly to show, that the deed by Mrs. Cooper to her husband was without consideration. Cooper, the husband, swore he did not give notice to appellants of that fact, and the appellants in their answers set up that they were without any notice, knowledge, or suspicion of a want of consideration in said deed when they loaned the money to the husband, but believed the same to be a valid and bona fide ⁴¹² conveyance, on the consideration therein expressed. They were nonresidents, and had, so far as appears, no acquaintance with A. P. Cooper or his wife, and acted in the matter on information derived through McEachin, the agent of said Cooper in procuring the loan. Every element of bona fide purchasers of the land embraced in said deed appears, and as to them, we must hold it to be good.

The proofs do show that the loan was to the husband, and his wife executed the mortgages to secure the payment of the same. The wife was incompetent under the statute to give the mort-

gages on her separate real estate to secure her husband's debt, and they must be held to be invalid.

It follows from what has been said that the mortgages of one hundred and twenty acres of land described in the deed of date the 4th of February, 1889, from Mrs. Cooper to her husband, and of the four-fifths interest of the husband in other lands as therein described, are valid and binding as a security for the debts therein mentioned, but are not binding and enforceable against the other lands therein described as belonging to Mrs. Mary A. Cooper. The chancellor declared said deed invalid and ordered it canceled. In this he erred.

He decreed the mortgages on the other lands described in them belonging to appellee, Mrs. Mary A. Cooper, to be without consideration, null and void, and not foreclosable, and in this there was no error; and that the said mortgages were valid, in so far as they conveyed the lands not belonging to her separate estate, and in which she had no interest, viz., the four-fifths interest of her husband in the lands mortgaged by him and her, and in this, there was no error.

An attorney's fee, on the facts presented, is due the complainants in the cross-bill for a foreclosure of the mortgages, but what is a reasonable fee in that behalf is not shown in the evidence set out.

The complainants in the cross-bill are entitled, as they pray, to a foreclosure of their said mortgages on the one hundred and twenty acres of land described in said deed from Mrs. M. A. Cooper to them, and on the interest of said Amos P. Cooper in the other lands, as said interest is therein described. The decree will be reversed and the cause remanded, that the debt and interest and a reasonable attorney's ⁴¹³ fee to appellants against the defendant, Amos P. Cooper, may be ascertained, and for a foreclosure of the mortgages according to their terms for the amounts thus ascertained to be owing by the defendant in the cross-bill, Amos P. Cooper.

The costs of the appeal will be taxed one-half to parties to the appeal, respectively.

Reversed and remanded.

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—CONVEYANCE TO HUSBAND.—A wife may deal with her husband with respect to her separate estate as though the relationship of marriage did not exist, subject to the conditions prescribed by statute: *Williams v. Harris*, 4 S. Dak. 22; 46 Am. St. Rep. 753. and note. In these states where the wife is given the right to convey her separate property as if "sole" or "unmarried," or as "any other person,"

without the consent of her husband, or without his joining in the conveyance, no good reason is seen why she may not convey directly to him, in the absence of fraud, actual or presumed, especially if the deed is based upon a good or valuable consideration: Extended note to *Turner v. Shaw*, 9 Am. St. Rep. 823. See *Rico v. Brandenstein*, 98 Cal. 465; 35 Am. St. Rep. 192.

HUSBAND AND WIFE—CONVEYANCE BETWEEN—ESTOPPEL OF WIFE.—If a wife transfers her separate estate to her husband to enable him to mortgage it as his property for his own benefit she is estopped by the mortgage, as against the mortgagee not shown to have had knowledge of the conveyance as a contrivance to evade the statute, to deny the validity of such conveyance or of the mortgage: Monographic note to *Trimble v. State*, 57 Am. St. Rep. 173, on estoppel against married women.

HUSBAND AND WIFE—WIFE AS SURETY FOR HUSBAND—HER SEPARATE ESTATE.—Under a statutory authority for married women to contract "as to their separate property," they cannot charge it as mere sureties: *Habenicht v. Rawles*, 24 S. C. 461; 58 Am. Rep. 268. See, also, *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503. And if a wife, to avoid a statute prohibiting her from becoming surety for her husband, and to enable him to mortgage her land, conveys her land through a third person to her husband, she is not estopped, the mortgagee having notice of all the facts, to deny the validity of the mortgage: Monographic note to *Trimble v. State*, 57 Am. St. Rep. 174.

ANSLEY v. BANK OF PIEDMONT.

[118 ALABAMA, 467.]

VENDOR AND PURCHASER—CONTRACT TO SET OFF LAND—RESCISSION.—To avoid a contract for the sale of land on the ground of false representations, the purchaser must offer to rescind on the ground of fraud and misrepresentation of the vendor, so long as the former remains in possession and refuses to surrender, and a plea seeking to avoid payment on such grounds, but failing to aver surrender of possession or some sufficient reason for not doing so is fatally defective.

VENDOR AND PURCHASER—CONTRACT TO SELL LAND—RESCISSION.—To avoid a contract for the sale of land on the ground of false representations, the purchaser must offer to rescind promptly upon the discovery of the fraud, and the failure to do so for a reasonable length of time after such discovery raises a presumption of acquiescence in its validity.

SETOFF—PLEA OF ADMITS VALIDITY OF CONTRACT.—A defendant who pleads a setoff and recoupment thereby admits the validity of the contract sued on.

FRAUD.—AN ENGAGEMENT OR PROMISE to be fulfilled in the future is not a representation, but the making thereof, having no intention at the time of performing it and made for the purpose of deceiving, constitutes fraud for which a contract may be avoided.

FRAUD.—MERE EXPRESSION OF OPINION, though acted upon, does not constitute a fraud or give rise to a cause of action. And, generally, representations as to prospective values are mere expressions of opinion.

SETOFF.—BREACH OF PROMISE CONTRACTUAL IN ITS NATURE to support a claim of recoupment or setoff, must be one capable of enforcement, and, if void under the statute of frauds, or

the damages for its breach are too speculative or remote to be capable of ascertainment with reasonable certainty, they are not recoverable by way of recoupment or setoff.

SETOFF.—PLEAS WHICH SET UP A BREACH OF CONTRACT in support of a claim of recoupment or setoff must be as distinct and unambiguous as if suing directly for the breach of the contract.

PLEADING.—DEFENDANT, BY SEPARATE PLEAS, may make as many defenses as he sees proper, whether repugnant to and inconsistent with one another or not, but a defense made by single plea must be consistent with itself.

PLEADING — INCONSISTENT PLEAS—FRAUD—SETOFF. Facts which show fraud averred in a plea in bar to the action because of fraud cannot be made the basis in the same plea to support a claim of setoff or recoupment.

PLEADINGS—MISJOINDER OF DEFENSES.—If a plea sets up a setoff or a right to recover damages by way of recoupment a claim arising ex contractu cannot be united in the same plea with a claim arising out of a tort.

PLEADINGS — DEFENSES — OBJECTION TO, HOW RAISED.—If a plea contains good matter of defense and also immaterial matter, the defect cannot be reached by demurrer to the whole plea, but objection should be raised by motion to strike out the immaterial matter.

SETOFF—DAMAGES WHEN REMOTE.—In an action on a note given for the purchase price of land, damages to the vendee arising from the failure of the vendor to secure the location of valuable improvements in the town in which such land is situated, and which it was represented would be there located, are too speculative and remote to form the basis of a plea in setoff or recoupment.

USURY.—AN ANTEDATED NOTE is not necessarily usurious. To make it so facts must be pleaded to show that it was antedated with intent to avoid the law of usury.

Matthews & Whiteside, for the appellant.

Cassady, Blackwell & Keith, and John B. Knox, for the appellee.

474 COLEMAN, J. The suit is by the Bank of Piedmont against the appellant, upon certain promissory notes executed by him in part payment of the purchase price of town lots sold by the Piedmont Land & Improvement Company at speculative prices and in anticipation of further advances, and which notes were assigned by the vendor to plaintiff after maturity. According to the pleas of the defendant, the present and real value of the lots did not exceed fifty dollars per lot, but their supposed prospective value at the time of the purchase exceeded five hundred dollars per lot. The defendant purchased at prospective prices. The defenses relied upon, as we gather from the seven special pleas, covering over seventeen printed pages, are in bar on account of the false and fraudulent representations by the vendor made with the intent to deceive, and which the defend-

ant, with many others, relied upon, and had the right to rely upon, and without which false and fraudulent inducements the defendant would not have purchased; and the breach of certain promises, assurances, and guarantees made by the vendor, which resulted in damage to the defendant and which are claimed in recoupment and setoff. The pleader declares that these representations were made in "divers ways," to wit, viva voce, newspapers, journals, handbills, circulars, "teeming with inspiring and transporting prophecies and predictions of the rapidly budding and surely approaching glory and renown of the embryonic city, and were replete with representations, promises, and assurances of many magnificent improvements, plants, and industrial enterprises, among others, rolling-mill, car-wheel foundry, a furnace, splendid hotel, waterworks, and electric plants, a three-story bank building"; and in one place the pleader avers that the land company promised and the unsuspecting public believed, that "one hundred millions of dollars" would be invested in industries in Piedmont as fast as they ⁴⁷⁵ could be built. We presume the pleader intended one million, instead of one hundred million. In contrast the pleader avers that the lots where these magnificent and vast enterprises were to be constructed are now almost worthless, and only used for pasturage. The pleader did not add to his pleas, as a fitting sequel, "*hinc illae lachrymae*" and "this defense."

Each of these special pleas were demurred to upon several grounds, and the court sustained the demurrer to all except as to pleas 4 and 6. The demurrers to pleas 4 and 6 were overruled, and, on the ruling, the plaintiff, appellee, assigns cross-errors. From this ruling of the court sustaining the demurrers, under a special statute for the city court of Anniston, the defendant appealed.

Much litigation has resulted from the financial depression which for several years past has pervaded the country, and which followed the speculative era. We have had frequent occasion to declare the law applicable to many of such transactions. In a court of law, the purchaser of land cannot resist the payment of the purchase money on the ground of the fraud and misrepresentation of the vendor, so long as he remains in possession, and refuses to surrender; and a plea which avers that the consideration of the contract sued upon was the purchase of land, and seeks to avoid liability upon the ground of fraud and misrepresentation on the part of the vendor, is defective, unless it avers a surrender of the land, or some sufficient reason for not surrendering the same be-

fore suit brought: *Jones v. State*, 100 Ala. 209; *Garner v. Leverett*, 32 Ala. 410. The rule is different in a court of equity: *Garner v. Leverett*, 32 Ala. 410. The pleas of defendant, setting up fraud and misrepresentation as a defense, going to the maintenance of the action by the plaintiff, were subject to this objection.

In the case of *Howle v. North Birmingham Land Co.*, 95 Ala. 391, we used this language: "The deceived party cannot remain quiet, and hold in reserve his option to rescind, to be asserted if a turn in events shall make it to his advantage to get rid of his obligations, but to be abandoned if it shall suit his purposes to hold the other party to the contract. Fraudulent misrepresentations in the sale of real estate do not confer upon the defrauded party the speculative advantage of being entitled to wait for the rise or fall in the value of the property, ⁴⁷⁰ and then act according to his interest in the matter. If the deceived party, after discovering the falsity of the representations upon the truth of which he claims to have relied, does not promptly avail himself of the right to rescind, he loses the right, and his failure for a considerable length of time to impeach the transaction raises a presumption of his acquiescence in its validity: *Lockwood v. Fitts*, 90 Ala. 150; *Orendorff v. Tallman*, 90 Ala. 441; *Sheffield Land etc. Co. v. Neill*, 87 Ala. 158; *Garrett v. Lynch*, 45 Ala. 204." The notes were executed in January or February, 1890, and were due in one and two years. The suit was instituted in March, 1895.

In some of defendant's special pleas, he offers to set off, and others to recoup, damages sustained by him in consequence of the false and fraudulent misrepresentations of the vendor. When set-off and recoupment are pleaded, the defendant thereby recognizes and admits the validity of plaintiff's contract. A plea of set off is in character a cross-action, and exists independent of plaintiff's cause of action. Recoupment springs out of the contract or transaction between the parties: *Grisham v. Bodman*, 111 Ala. 194; *Watson v. Kirby*, 112 Ala. 436.

Again, an engagement or promise to be fulfilled in the future is not a representation. The making of such engagement or promise, having no intention at the time of performing, and made for the purpose of deceiving, constitutes fraud which will avoid the contract: *Nelson v. Shelby etc. Co.*, 96 Ala. 532; 38 Am. St. Rep. 116; *Joseph v. Decatur Land etc. Co.*, 102 Ala. 346; *Birmingham Warehouse etc. Co. v. Flyton Land Co.*, 93 Ala. 549; *Bradfield v. Elyton Land Co.*, 93 Ala. 527; *Cooke v. Cook*, 100

Ala. 175. Generally, the mere expression of an opinion, though acted upon, does not constitute a fraud, or give rise to a cause of action: Authorities *supra*. A party who knows that representations as to facts, when made, are untrue, cannot claim to have been deceived and misled by them: *Baker v. Maxwell*, 99 Ala. 558. The breach of a promise contractual in its nature, or of an engagement, which will support a claim for recoupment or set-off, must be one capable of enforcement. If void by reason of the statute of frauds, or otherwise, or if the damages claimed from the breach of a valid promise or engagement are speculative merely, remote and incapable of ascertainment with reasonable ⁴⁷⁷ certainty, in either event, the damages are not recoverable in a direct action or by way of setoff or recoupment. A plea which sets up a breach of a contract in support of a claim of set-off or recoupment must be as distinct and unambiguous as if suing directly for the breach of the contract. He must advise his opponent of the precise grounds of his complaint. As a general rule, representations as to prospective values are mere expressions of opinions, and any statement or representation, incapable at the time, because of their character, of ascertainment as an existing fact, must be classed as mere expressions of opinion.

A defendant by separate pleas may make as many defenses as he sees proper, and the pleas are not objectionable because of repugnancy or inconsistency with each other. The rule does not apply to single pleas. A single plea should be consistent with itself. Facts which show fraud, and averred in a plea in bar to the action because of fraud, cannot be made the basis in the same plea to support a claim of setoff or recoupment. In one plea the defendant might plead fraud in bar of the action, and in another plea he could ratify the sale and purchase, recognizing the right of the plaintiff to maintain the action for the purchase money, but claim damages for breach of the agreement or for a deceit practiced upon him. Any breach of an agreement, or any deceit which would support an independent action, growing out of the contract, is available by recoupment. When the plea is in bar on account of fraud, the plea must show a return of the property. A restoration is not required in order to authorize an action to recover damages for deceit, or for breach of agreement.

None of the pleas show a failure of consideration available as such to defendant. There is no pretense that there was any defect in title, or that defendant was not able to obtain possession,

or that the lot was other than represented. The defenses are based upon rescission for fraud, and claim for damages, for breach of contract, and for deceit. Another rule which applies to pleas as well as to declarations is, that a claim for damages *ex contractu* cannot be united in the same plea with a claim in tort. This rule was totally disregarded in some of the pleas. Another rule is, that if a plea contains good matter of defense and also immaterial matter, the defect ⁴⁷⁸ cannot be reached by a demurrer to the whole plea. It may be that the court would entertain a demurrer directed specially to the immaterial matter, but the proper mode is by motion to strike out the immaterial matter. The plaintiff did not avail himself of either of these methods.

The demurrer of the plaintiff to some of the defendant's pleas raises the question as to whether the damages claimed as setoff or recoupment are not too uncertain for ascertainment, and purely conjectural. The basis upon which defendant's claim for damages rests is, that the vendor represented that it had a large amount of cash capital on hand for improving and building up valuable enterprises, and promised and agreed to erect, and guaranteed the erection and construction of, many valuable improvements in the "embryonic" city of Piedmont, as an inducement to purchasers, which undertakings and guaranties had been broken; and in some of the pleas it is averred that these statements were false and fraudulent, etc., to the damage of the defendant. The pleas nowhere state the existing boundaries of the contemplated city, nor the location of these several improvements, nor the relative location of plaintiff's lot thereto. But independent of these difficulties which meet us at the very beginning, is there any data, other than purely conjectural, by which the enhancement of property can be reasonably ascertained from such causes? If the improvements had been actually made, by comparing the value of the lot after the improvements with the value before the improvements, the difference would show with some approximation the effect of the improvements. There would be facts upon which a jury might base calculations, but it seems to be the climax of conjecture and guess to undertake to declare in advance how any particular lot would be affected in the future by improvements, if made, and especially is this true when there is no obligation or representation as to their relative location. There is no standard in such a case by which the enhancement in value can be calculated. The plea shows on its face that the purchase of the lot was a mere adventure—an adventure, it may be, encouraged and induced by the fraudulent

statements or promises of the vendor, and which deceptive inducements might be sufficient to authorize a rescission of the purchase, but ⁴⁷⁹ the facts averred, if embodied in a complaint suing for damages, are wholly insufficient to support the action for their recovery: *Brigham v. Carlisle*, 78 Ala. 243; 56 Am. Rep. 28; *Young v. Cureton*, 87 Ala. 727; *Pollock v. Gantt*, 69 Ala. 377; 44 Am. Rep. 519; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354; 26 Am. St. Rep. 101; *Roberts v. New York R. R. Co.*, 128 N. Y. 455. Mere representations as to the present pecuniary value of a lot would hardly be actionable, for the reason that values are but the expression of opinions; much less could the representations as to the future value of a lot be actionable. Clearly this would be but the expression of an opinion: *Deming v. Darling*, 148 Mass. 504.

The plea of usury is objectionable. The note was given for the purchase of land. There was no question of the loan of money in the transaction. It may be that the notes as written represent truly the purchase price as agreed upon. It does not follow as a matter of law that a note antedated is usurious. Much depends upon the nature of the transaction and the intention of the parties. If the note was antedated, merely to avoid the law of usury, it would be usurious, but facts should be averred, followed by an averment that it was done with a usurious intent.

Applying the principles of law applicable to the pleas of the defendant, as declared in the foregoing opinion, and it will be seen that none of them, including pleas 4 and 6, are good.

Affirmed on direct appeal, and reversed on cross-appeal.

VENDOR AND PURCHASER—RESCISSION BY PURCHASER—NECESSARY STEPS—LACHES.—To avoid a contract for the purchase of land on the ground of fraud in the vendor, the vendee must repudiate the contract and demand its rescission immediately upon discovering the fraud; and if, after such discovery, he remains quietly in possession for a long time, he cannot afterward avoid the contract: *Blen v. Water etc. Co.*, 20 Cal. 602; 81 Am. Dec. 132. The vendee must abandon the land to the vendor: *Duncan v. Jeter*, 5 Ala. 604; 39 Am. Dec. 342; *Mecklem v. Blake*, 22 Wis. 495; 99 Am. Dec. 68; *Goodrich v. Lathrop*, 94 Cal. 50; 28 Am. St. Rep. 91. As to what is reasonable delay, see *Hammond v. Wallace*, 85 Cal. 522; 20 Am. St. Rep. 239; *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1; 57 Am. St. Rep. 427.

SETOFF—WHAT DEMANDS MAY BE PLEADED—PROCEDURE.—Legal claims only can form subjects of setoff, or be filed in bar to any action at law; they must be such as the party could sue for and recover at law: *Milburn v. Guyther*, 8 Gill, 92; 50 Am. Dec. 681; *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243. If the claim is for damages, they must not be too remote: *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299; and must be liquidated: *Smith v. Washington Gaslight Co.*, 31 Md. 12; 100 Am. Dec. 49. A

notice of setoff need not be as precise and formal as a declaration, but it must describe with reasonable certainty the demand sought to be set off: *Lewis v. Culbertson*, 11 Serg. & R. 48; 14 Am. Dec. 607.

FRAUD—PROMISES NOT INTENDED TO BE PERFORMED.—Ordinarily, promises to perform acts in the future, although made by one party as a representation to induce another to enter into the contract, will not amount to legal fraud, though the promises are subsequently entirely broken and unfulfilled without excuse. But it has been held that making a promise with no intention of performing it constitutes fraud for which a contract may be rescinded: *Note to Clinch Valley Coal etc. Co. v. Willing*, 57 Am. St. Rep. 622.

FRAUD—EXPRESSION OF OPINION.—Mere expression of belief or opinion cannot in general constitute fraud: *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196, and note.

GEORGIA HOME INSURANCE COMPANY v. WHARTON.

[113 ALABAMA, 479.]

CONTRACTS—INSURANCE SETTLEMENT—RESCISSION. If a claim for loss of an insured stock of goods has been adjusted and settled between the parties thereto, and the insurer has paid the amount agreed upon, and the insured has given his receipt therefor, the fact that the insured was ignorant of contracts of insurance and of the proper basis for adjusting losses, and was so hurried in the settlement in the absence of counsel that he signed the settlement without reading it, is not ground for a rescission of the settlement and a restoration of the insured to his rights under the policy, when the absence of, or a desire to consult with, counsel is not communicated to the insurer, and the haste of the insured in making the settlement cannot be attributed to any act of the former.

CONTRACTS.—IGNORANCE OF LEGAL OBLIGATIONS and effects of contracts, into which parties voluntarily enter, fraud not intervening, and of which there is no averment, is not ground for the avoidance of such contracts.

CONTRACTS—FAILURE TO READ—AVOIDANCE.—Written contracts cannot be avoided by parties signing them on the ground that they did not read them before signing, when an opportunity to read them has been afforded.

CONTRACTS — RESCISSION.—MISREPRESENTATION OF MATERIAL FACTS, on which the party acting relies, and has a right to rely, whether made willfully and intentionally, or innocently from ignorance, inadvertence, or mistake, avoids a contract which it may have induced, but, in the absence of a relation of trust or confidence, a misrepresentation of matter of law, or of judgment, equally open to the observation or inquiries of both parties, or of mere opinion, is not a fraud and not ground for avoiding a contract.

CONTRACTS — INSURANCE SETTLEMENT — RESCISSION.—Affirmation or misrepresentation by an insurer of matters of law or of judgment, or mere expression of opinion inducing a settlement of loss between himself and the insured, the facts being open equally to the observation and inquiry of both parties, is not ground for the rescission of the settlement into which the parties have entered, and which has been fully executed by performance on the part of the insurer.

CONTRACTS — INSURANCE SETTLEMENTS — RESCISSION.—Settlements or adjustments of insurance losses by agree-

ment of the insurer and the insured, when fully performed, have all the elements and properties of a contract, and, in the absence of fraud, are as incapable of rescission as any other contract.

CONTRACTS — INSURANCE SETTLEMENT — RESCISSION—EVIDENCE.—In an action to rescind a settlement of insurance loss made between the insured, the defendant insurer, and other insurance companies, a letter written by an agent of an insurer other than the defendant is not admissible in evidence against him, although such agent was present at the settlement.

R. W. Walker and Tompkins & Troy, for the appellant.

McClellan & McClellan, for the appellee.

⁴⁸⁴ BRICKELL, C. J. The complaint contains three counts; the first and second are analogous to the form prescribed by the code for a complaint on a policy of fire insurance, and their sufficiency is not drawn in question. The third, a demurrer to which was overruled, may be termed a special count, setting forth a particular state of facts on which the right of recovery is based. The count, when analyzed, alleges that after the occurrence of the loss and injury to the stock of goods covered by the policy of insurance, and after the agent of the defendant, and the agents of the other companies interested, had examined into the loss, by the mutual agreement of the parties, the liability of the insurers was fixed at an aggregate sum, which was apportioned between the several insurers, paid to the plaintiff, and acknowledgments of payment in writing were signed by her and delivered to the several insurers. The count avers that the loss and the amount she was entitled to receive exceeded the amount paid to her; and by averments of her ignorance of contracts of insurance, and of the proper basis of adjusting losses, she claims a rescission of the adjustment or settlement and a restoration to her rights under the policy. These averments are coupled with the further averment that she was hurried into the settlement in the absence of her counsel from the state; that she signed at the instance of the defendant, without reading it, a long paper writing, which she then supposed was in accordance with the adjustment; that her agent, through whom the adjustment was made, was prevented from reading the writing ⁴⁸⁵ except as to the amounts due from the several insurers. That she was induced into the settlement, and was misled and deceived by the representations made to her by the agent of the defendant, that as to the value of the goods insured, she was absolutely bound by an inventory taken on the preceding 1st of January, more than two months before the loss; and that under a clause in the several policies, the insurers were liable for only three-fourths of the value of the goods lost, from

which the value of the goods saved must be deducted; and that for the cash payment of the loss, a discount of thirty-two dollars and eighteen cents should be allowed.

In the construction of the count—in the ascertainment of its gravamen, in a legal sense—we may discard as irrelevant, as mere surplusage, the averment that the plaintiff was hurried into the settlement in the absence of her counsel from the state; for her haste is not attributable to any act of the defendant, nor was the absence of the counsel communicated to the defendant, nor that consultation with him, before entering into the settlement, was desired. So the averred ignorance of the plaintiff of contracts of insurance and of the proper basis of adjusting losses is mere surplusage and irrelevant. Ignorance of the legal obligations and effects of contracts, into which parties voluntarily enter, fraud not intervening, of which there is no averment, will not avoid the contract, “or prevent the parties from coming to a common mind concerning it”: 1 Wharton on Contracts, sec. 198. Besides, while the plaintiff professes ignorance, it is not ascribed to her agent, by and through whom the settlement was made. Like observations may be made in reference to her failure to read the paper writing, presumably the evidence of the settlement and of the payment of the money. There was no want of opportunity to read it, and writings cannot be avoided by parties signing them, who will not read them, when opportunity is afforded. It is well said: “If this were permitted, contracts would not be worth the paper on which they were written”: Upton v. Tribilcock, 91 U. S. 50. And it must be observed that a peculiarity of the count in this respect is the want of all averment of falsity in the writing. So far as appears, it contains no more, expresses no more, than it was intended to contain and express—it is a truthful memorial of the transaction ⁴⁹⁶ to which it refers. A demurrer is an admission of facts well pleaded; it is not an admission of mere surplusage, of foreign or irrelevant matter which may be introduced into pleading: 1 Chitty on Pleading, 661. Eliminating these matters from the count, its real gravamen consists in the averment of the misstatements or misrepresentations imputed to the agent of the defendant; these operated on the plaintiff, inducing the settlement.

Assuming that it may properly be deduced from the averments of the count that these representations were untrue—that as to the value of the goods lost, the plaintiff was not absolutely bound by the inventory taken on the preceding 1st of January, and that upon a just construction of the clause of the policy of insurance,

limiting the liability of the defendant to three-fourths of the value of the goods lost, the defendant was not entitled to a deduction of the value of the goods saved—the inquiry arises as to the legal character and force of these representations. It is not every representation, untrue in itself, made in the course of negotiations leading to a contract, which will justify or authorize a rescission of the contract. As a general rule, it has long been the doctrine prevailing in this court that the misrepresentation of material facts, on which the party acting relies, and has the right to rely, whether made willfully and intentionally, or innocently, from ignorance, inadvertence, or mistake, will avoid a contract it may have induced: *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Munroe v. Pritchett*, 16 Ala. 785; 50 Am. Dec. 203; 22 Ala. 501; *Davis v. Betz*, 66 Ala. 210; *Rivers v. Du Bose*, 10 Ala. 475; *Townsend v. Cowles*, 31 Ala. 428. But these and all our decisions hold that, in the absence of a relation of trust and confidence, or of some other peculiar fact or circumstance, a misrepresentation of matter of law, or of matter of judgment equally open to the observation or inquiries of both parties, or of mere opinion, will not vitiate a contract. “Error in the view one or both parties,” it is said by Wharton, “may take of the law as bearing on the subject matter of the proposed contract does not avoid the contract, or prevent the parties from coming to a common mind concerning it. All persons are presumed to know the law, and when the presumption relates to the public law of the land it is irrebuttable.” And he quotes the observation of Lord Ellenborough, that “if, upon the mere ground of ignorance⁴⁸⁷ of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proper proof”: 1 Wharton on Contracts, sec. 198. In *Townsend v. Cowles*, 31 Ala. 428, after a careful examination of authority, and deliberate consideration of the subject, it was ruled that a misrepresentation of the legal effect of a written instrument was, from its very nature, but the expression of an opinion upon a question of law, equally open to the observation and inquiries of both parties, and as to which the law presumes that the party to whom it was made had knowledge.

There was, in the transaction alleged in the count, no misrepresentation or mistake of fact by either party; the facts were undisputed and known to the parties equally. A loss covered by the

policy having occurred, and there not having been a breach of the conditions of the policy by the insured, the extent of the liability of the insurer—the sum he was bound to pay, and which the insured was entitled to demand and receive—and the time of payment depended on the stipulations of the policy. The policy was the property of the plaintiff, in her possession, examinable by her before its acceptance and during the whole period elapsing after its delivery. Knowledge of its terms and stipulations must be imputed to her—the presumption is irrebuttable. Whether, according to its terms, the inventory taken preceding the loss was absolutely binding on her, or was mere matter of evidence, as to the value of the goods lost, was matter of construction, if the policy contained any term or stipulation touching or concerning the inventory. If it contained none, whether the inventory was evidence as to the value of the goods, or the extent to which it was evidence, was matter of law, not of fact. And so, whether the clause in the policy limiting the liability of the insurer to three-fourths the value of the goods, entitled him to a deduction of the value of the goods saved was matter of construction of the clause; if the clause was not capable of the construction, or was silent in reference to it, the claim of the deduction was the assertion of matter of law, of a legal right. When the ⁴⁸⁸ loss was payable, whether presently on the adjustment, or at a future day, depended on the terms of the policy; and if payable at a future day, whether there should be a discount for a present or cash payment was matter of construction of its terms. In whatever aspect the representations may be considered, they fall within one or the other of the categories, of being the affirmation of matters of law, or mere expressions of opinion, or as having reference to matters of judgment, the facts open equally to the observation and inquiry of both parties. This being true, they do not authorize or justify a rescission of the adjustment or settlement into which the parties entered, and which was fully executed by performance on the part of the defendant. Settlements or adjustments of this character by the agreement of the insurer and the insured, when fully performed have all the elements and properties of a contract, and, in the absence of fraud, are as incapable of rescission as any other contract. Mere ignorance of the rights the law attaches to the well-known facts will not vitiate them, they are conclusive on both parties: May on Insurance, sec. 452 F. If either party, the insured or the insurer, yields to a misrepresentation of his rights, or to the unjust demands or exactions of the other, he has only his own folly, or his reluctance to engage

in litigation, of which to complain: *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357. The full discussion of this particular question in these cases supports the conclusion we have reached. There was of consequence error in overruling the demurrer of the defendant to this count. The special replication to the pleas of the defendant, to which it refers, is substantially a repetition of the averments of the third count, and, for the reasons already given, the demurrer to it should have been sustained.

The assignments of error relate to other rulings on the pleadings, but they have not been insisted on in the argument of counsel, and we do not deem it necessary to consider them.

There are several exceptions reserved to the admission of evidence, and to instructions given the jury. The rulings of the court to which they relate seem to us dependent on principles so well settled it is not necessary ⁴⁸⁹ to discuss them. There is but one of them which we regard as erroneous. *Abrams* was not the agent of the defendant, and the letters he had written the plaintiff or her agent, if relevant, were not admissible evidence against the defendant. The mere fact that he was present when the settlement was made with the plaintiff, representing another company making a like settlement, is far from showing that the defendant and the company he represented bore any such relation as would make the declarations or admissions of the agent of the one binding on, or evidence against, the other.

For the errors pointed out, the judgment must be reversed and the cause remanded.

CONTRACTS—FAILURE TO READ.—One who signs a written contract in ignorance of its contents, and without reading it, is presumptively guilty of gross negligence, and cannot avoid it on the ground that he did not read it or know its contents: Monographic note to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 513.

A MERE IGNORANCE OF THE LAW does not authorize a court of equity to set aside a contract or to reform an instrument; yet, if that ignorance is superinduced by the other party, or there is a misplaced confidence, or if advantage is taken of weakness of intellect, these and other influences, mixed with ignorance of law, are sufficient: Monographic note to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 513. See *Gage v. Phillips*, 21 Nev. 150; 37 Am. St. Rep. 494, and note.

FRAUD—WHAT CONSTITUTES—EXPRESSION OF OPINION—FALSE REPRESENTATIONS.—Mere expression of opinion, though acted upon, does not constitute a fraud or give rise to a cause of action: *Ansley v. Bank of Piedmont*, 113 Ala. 467; ante, p. 122 and note. Whether representations are made innocently or knowingly, they operate equally as a fraud upon a party who relies upon

them in ignorance of the facts, provided they are false and made unqualifiedly as of the party's own knowledge: *Bullitt v. Farrar*, 42 Minn. 8; 18 Am. St. Rep. 485, and note. See, also, *Prewitt v. Trimble*, 92 Ky. 176; 86 Am. St. Rep. 586, and note. And if the means of knowledge are at hand and equally available to both parties, and there are no fiduciary or confidential relations, nor any warranty of the facts, the injured party must show that he has exercised ordinary care and diligence to avail himself of the means of information existing at the time of the transaction, before he will be heard to say that he was ignorant of what he was doing, or deceived or misled by the representations of the other party: *Extended note to Spitze v. Baltimore etc. R. R. Co.*, 82 Am. St. Rep. 384.

CONTRACTS.—INSURANCE SETTLEMENTS are subject to the same rules as to rescission as are other contracts: *Harkey v. Mechanics' etc. Ins. Co.*, 62 Ark. 274; 54 Am. St. Rep. 295, and note; *Titus v. Rochester etc. Ins. Co.*, 97 Ky. 567; 58 Am. St. Rep. 426.

WILCOX v. SAN JOSE FRUIT PACKING COMPANY.

[118 ALABAMA, 519.]

PRACTICE—SUBMISSION ON AGREED FACTS—SUBSEQUENT EVIDENCE.—If a case is submitted on agreed facts, the court has no power, without first setting aside such submission, to permit one party, over the objection of the other, to introduce additional facts in evidence, the existence of which was well known prior to such submission.

SALES—CONTRACT FOR—RESCISSIION.—To entitle a vendor to rescind a sale of goods and recover them from the purchaser, he must first restore the latter to the same condition and advantage, so far as can be reasonably done, as he occupied before the purchase, and his insolvency does not excuse this duty on the part of the vendor.

SALES—RIGHT TO RESCIND.—If the purchaser of goods pays the freight charges thereon, and they are delivered to him as directed by the seller, upon his acceptance of a draft drawn upon him by such seller, the latter cannot rescind the sale and recover the goods without returning or tendering the accepted draft to the purchaser, and he is not released from this obligation by the insolvency of the purchaser.

Graham & Steiner, for the appellant.

Sayre & Pearson, for the appellee.

521 **COLEMAN, J.** Birch & Crawford purchased from the Fruit Company (appellee) a carload of fruit, shipped from California, to the purchaser in Montgomery. Birch & Crawford failed in business and assigned. The vendor, the plaintiff, instituted the present action of detinue for the carload of fruit against appellant Wilcox, the assignee. The case was submitted to the court for decision without a jury upon the following agreed statement of facts:

"That Birch & Crawford were, at the time of the purchase of

the goods sued for, insolvent or in failing circumstances. That at that time Birch & Crawford had no reasonable expectation of being able to pay for the goods. That Birch & Crawford failed to disclose their financial condition to plaintiff; no demand was made on them for a statement, and none was made. That before the bringing of this suit, Birch & Crawford bought on credit from the plaintiff the goods sued for, and they have never been paid for.

"That Birch & Crawford made a general assignment to defendant, M. P. Wilcox, for the benefit of their creditors ⁵²² on October 17, 1896. Said assignment is made a part of this agreement.

"That on October 16, 1895, Birch & Crawford paid the freight on the goods in controversy, but they were left in possession of the railroad company. That on the eighteenth day of October, 1895, the assignee, Wilcox, the defendant, took the goods from the railroad and put them in the place of business which had been occupied by Birch & Crawford, but then in his charge, and they were in his possession when this suit was brought. About a week after the assignment, plaintiff's attorney made demand on said Wilcox for the goods.

"That a bill of lading was attached to the draft drawn by plaintiff on Birch & Crawford for the purchase price of the goods in suit, with instructions to the bank to which it was sent for acceptance and collection to deliver the bill of lading when the draft was accepted by Birch & Crawford; that the draft was accepted and the bill of lading delivered to Birch & Crawford on October 16, 1895. The draft was dated October 2, 1895, and was payable sixty days after date; that the First National Bank of Montgomery, to which the draft was sent, had instructions to retain the draft and collect on maturity; that the said bank kept the draft, and on or about its maturity, without any further instruction from the plaintiff, presented it to Birch & Crawford for payment, which was refused; that at the time of the bringing of this suit, plaintiff deposited in the said bank two thousand five hundred dollars to indemnify said bank against loss it might suffer by reason of making bond for plaintiff to bring this suit, which said bank did. The plaintiff never tendered back to Birch & Crawford the freight money nor the acceptance. Upon the foregoing, which are the facts, it is agreed that the court shall decide the case, a jury being waived. The value of the property is one thousand four hundred and forty-one dollars and seventy-five cents; property in possession of plaintiff."

The day after the cause had been submitted, but before a decision had been rendered, the plaintiff obtained leave of the court to withhold its decision until they could send to California and get the acceptance spoken of in the agreed statement of facts, and to tender it to defendants, and to make proof of these facts, and to file the acceptance in court with the papers. The court granted the motion, held up its decision until the draft ⁵²³ had been received, and tendered and filed, against the objection of the defendant, and that, too, as appears from the abstract, without setting aside the submission, and placing the parties in statu quo.

The draft with the acceptance is as follows:

"\$1,145.75.

Office of San Jose Fruit Packing Company,

San Jose, Cal., Oct. 2d, 1895.

Sixty days after date pay to the order of ourselves, eleven hundred forty-five 75-100 dollars, United States gold coin, with exchange on New York or San Francisco, value received, and charge the same to account of

No. 341.

SAN JOSE FRUIT PACKING CO.

Per p. a 120

H. H. Peate,

Treasurer.

To Birch & Crawford, Montgomery, Alabama."

The court gave judgment for the plaintiff, and defendant appealed.

Two questions are presented: Did the court have authority to receive the additional evidence? and if not, did the agreed statement of facts authorize the judgment of the court? We are of opinion that both of these questions must be answered adversely to appellee. The conclusive presumption is, that the defendant would not have consented to the submission of the cause for decision by the court upon any other than the agreed statement of facts. If the court had decided the case upon the agreed facts in favor of defendant, and the plaintiff's right to a new trial had depended upon the right to obtain and introduce the accepted draft on another trial, no proof of diligence was shown nor evidence offered to show why the acceptance was not introduced on the first trial. When parties go to trial relying upon such evidence as is present, knowing at the time there is additional evidence, and lose, they are not entitled to another hearing, without some showing other than the mere proof of the ex-

istence of such other evidence. The principle is the same. The defendant had a right to a decision of the cause upon the facts upon which the cause was submitted. Of course, the court had the power during the term, for good cause, to set aside the submission. This was not done.

524 It is contended by appellee that the judgment of the court was right, upon the agreed statement of facts, independent of the accepted draft, and that, if the action of the court in receiving the draft was erroneous, it was error without injury; and for this reason we are asked to affirm the judgment of the court. It is not controverted that under the facts the plaintiff had the right to rescind the contract of sale, and we will not consider that question. The question of merit is, Did the plaintiff do all that was required of it to effect a rescission, and authorize it to recover? The agreement shows that the plaintiff drew a draft on the 2d of October, 1895, payable to its own order, sixty days after date, on the purchasers, Birch & Crawford, to which the bill of lading was attached, and forwarded the same to the First National Bank of Montgomery for acceptance, with instructions to deliver the bill of lading when the draft was accepted, and to retain the draft for collection. The draft was accepted, and the bill of lading delivered to Birch & Crawford on the 16th of October, 1895. The suit was instituted on the 7th of November, 1895, nearly a month before the maturity of the draft. Without further instructions than those originally given, the First National Bank held the draft for collection until maturity, and then presented it to Birch & Crawford for payment on their acceptance.

On the day of the delivery of the bill of lading, to wit, the 16th of October, Birch & Crawford paid the freight on the car of fruit. On the next day (17th of October), Birch & Crawford assigned to Wilcox, the defendant, who then took possession of the goods from the railroad. The plaintiff brought its suit, and proceeded to trial without offering to pay back the freight charges, and without offering to return the accepted draft before bringing suit or during its pendency or at the trial; and the evidence shows that after the suit was instituted, and before trial, the First National Bank, in pursuance of instructions, presented the acceptance for payment, and, for aught that appears from the agreed facts, the acceptance is still outstanding either in the possession of the plaintiffs or some indorsee as a claim against the purchaser. We do not doubt that the defendant was entitled to judgment.

Appellee's contention is, that the evidence shows that 525

Birch & Crawford were insolvent; and, therefore, it argues that the acceptance was wholly worthless, and plaintiff was relieved from tendering the draft to defendant, and filing it in court for the defendant, during the trial. Neither of the cases cited by the appellee support this contention. That of Frost v. Lowry, 15 Ohio, 200, presented a case of acceptance by an accommodation acceptor, in which it was expressly shown that the acceptor had no funds of the drawer. The facts further show that the draft was tendered back, with the acceptance erased, and no objection raised on account of the erasure, and the court held that it was a waiver. In addition, the facts show that the draft was brought into court at the trial and tendered to defendant. In the case of Thurston v. Blanchard, 22 Pick. 18; 33 Am. Dec. 700, it was held, that if the plaintiff had the note at the trial, having never indorsed or assigned it, ready to be delivered up, and actually delivered up, that would be a sufficient return of the obligation to authorize a recovery. So in the case of Duval v. Mowry, 6 R. I. 485, the facts show that the acceptance was brought into court at the trial and surrendered. The argument of the court tends to show that if the acceptance was "wholly worthless," the plaintiff was not required to tender back the acceptance before bringing suit.

The rule is almost universal that, to entitle a vendor to rescind a sale of goods and recover them from the purchaser, he must first restore the party to the same condition and advantage, as far as can be reasonably done, as he occupied before the purchase.

In the case of Evans v. Gale, 18 N. H. 397, the court refused to allow evidence of insolvency as an excuse for not returning the obligation, remarking that it by no means followed that because a party at a particular time was unable to pay his debt, that he never would pay it, or that he would remain insolvent. We cite also the following authorities: Hoyt etc. Mfg. Co. v. Turner, 84 Ala. 523; Jones v. Anderson, 76 Ala. 427; Jones v. Anderson, 82 Ala. 302; Young v. Arntze, 86 Ala. 116, and cases cited under said authorities; Walker v. Louisville etc. R. R. Co., 111 Ala. 233.

We have considered the case as it is made by the record. We must not be understood as holding that, under the circumstances, the plaintiff should return or ⁵²⁶ tender to the vendee the freight paid by him to entitle him to a rescission of the sale and recovery of the goods; nor do we decide that the agreement of the parties will preclude the plaintiff from filing in court, for the defendant on another trial, the acceptance.

Reversed and remanded.

SUBMISSION OF CAUSES—PRACTICE.—If the facts of a case are agreed upon and the questions of law alone are submitted to the court for its judgment, the court can only respond to the questions of law arising from the admitted facts, and will not infer another fact and pronounce the law arising therefrom: *Bott v. McCoy*, 20 Ala. 578; 56 Am. Dec. 223; *Van Brunt v. Pike*, 4 Gill, 270; 45 Am. Dec. 126. See, also, *Sawyer v. Corse*, 17 Gratt. 230; 94 Am. Dec. 445.

SALES—RESCISSION BY VENDOR.—A vendor who seeks to have a contract of sale set aside upon the ground of fraud, must offer to return the purchase money in order to put the purchaser in statu quo: *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733, and note. For an exception to this rule, see *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228; 53 Am. St. Rep. 527. A vendor to whom a vendee has given his negotiable promissory note for goods is not bound to tender such note at the time of rescinding the contract; it is sufficient if he produce it upon the trial, and deliver it into the custody of the court: *Nichols v. Michael*, 23 N. Y. 264; 80 Am. Dec. 259, and note.

DECATUR MINERAL LAND COMPANY v. PALM.

[113 ALABAMA, 581.]

CORPORATIONS—INJUNCTION TO PREVENT ABUSES—ATTORNEY'S FEE.—If, in a suit by a minority of the stockholders of a corporation to prevent mismanagement of the corporate business, and for an injunction to prevent the payment of unreasonable and exorbitant claims held by its officers for their salaries, and to restrain the directors from voting excessive salaries to such officers, the relief prayed for by injunction is granted, the complainants are entitled to recover a reasonable attorney's fee to be paid by the corporation, but the amount of such fee must be determined from the evidence, and the court cannot take judicial knowledge of the value of the services rendered by such attorney.

CORPORATIONS — INJUNCTION — MINORITY STOCKHOLDER, WHEN ENTITLED TO.—(A minority stockholder in a corporation, who cannot obtain redress through the directors or stockholders for a corporate wrong of the directors in voting to the corporate officers unreasonable and exorbitant salaries, is entitled to an injunction to restrain and correct such wrong.)

CORPORATIONS — ACTION BY MINORITY STOCKHOLDER TO REDRESS CORPORATE WRONG—WHAT FACTS MUST BE SHOWN.—(To entitle a stockholder in a corporation to maintain an action against it in his own name to redress corporate wrongs he must show by his complaint to the satisfaction of the court that he has sought within the corporation redress of the wrongs alleged, that he has requested the managers or directors to redress such wrongs, and, failing with them, has applied to the stockholders for relief, or, if he has not sought redress within the corporation, he must, with particularity and definiteness, allege facts which constitute a satisfactory excuse therefor; otherwise, his complaint is subject to demurrer.)

Harris & Eyster, for the appellants.

Clifton & Eckford, and Humes, Sheffey & Speake, for the appellee.

⁵³⁵ COLEMAN, J. Otto Palm and others, minority stockholders in the appellant corporation, filed their bill, in which it is averred that appellants, Thomas M. Scruggs and S. M. Nelson, controlled a majority of the stock of the corporation, and used their power in the selection of the board of directors, and dominated the management of the corporation for their personal advantage. The principal wrongs complained of consist in the election of incompetent and unfaithful persons as president and secretary, to wit, Thomas M. Scruggs and S. M. Nelson, and the appropriation by the directors of exorbitant and unreasonable amounts to their salaries, and neglect of duty on their part. The bill prays for the removal of these and other members of the board of directors, for an injunction to restrain the board from voting unreasonable salaries hereafter, for an account to ascertain how much they have received over and above what is just and reasonable, a decree for such excess, and a cancellation of the notes held by such officers against the corporation for unpaid salaries, in excess of what they should be allowed. The bill also prayed for a receiver.

It will be seen from this statement of the purposes of the bill that the corporation is the proper complainant, and that stockholders are not allowed to apply to a court of equity for relief in such a case, except upon averment and proof that the corporation has refused, upon application, to remedy the wrong, or upon sufficient averments to show that application to the board of directors or stockholders would have been in vain, or the circumstances were such as to excuse the complaining stockholders from first seeking a remedy in this way, if there can be any other in any case.

At the final hearing, the court granted relief to complainants, ⁵³⁶ in so far as the bill prayed for a cancellation of the outstanding and unpaid claims of the president and secretary for salaries, and awarded an injunction to restrain the board of directors from voting unreasonable compensation to said officers, and allowed complainants a solicitor's fee to be paid by the corporation. The respondents appeal from this decree. If the complainants were entitled to the relief granted, the benefit resulted to the corporation, and through it to all the stockholders, as such, alike. The complainants could receive no advantage which would not operate equally for the advantage of all the stockholders. If the corporation had filed the bill, there can be no doubt that its solicitors would have been entitled to reasonable compensation to be paid by the corporation. Its refusal

necessitated the filing of the bill by the stockholders. Under these facts, we have no doubt that the corporation is chargeable with whatever compensation the complainants' solicitors are entitled to. The amount of the fee, however, should have been determined from the evidence. We do not think the court could take judicial knowledge of the value of services rendered by the solicitors: *Clark v. Knox*, 70 Ala. 607; 45 Am. Rep. 93. The evidence shows that S. M. Nelson and Kate Guthertz were sisters, and Thomas M. Scruggs their nephew, that these three stockholders owned but little less than a majority of the entire outstanding stock, that at some of the meetings of the stockholders their stock exceeded a majority of the stock present and voting, and that at other meetings their stock and that held by them as proxies constituted a majority. The stock owned by these three shareholders and that controlled by them was voted in concert, either S. M. Nelson or Thomas M. Scruggs generally voting that owned by Kate Guthertz.

It is reasonably clear that they dominated the stockholders' meetings, and elected the board of directors, of which the said Scruggs and Nelson were always included as members. The by-laws authorized the directors to fix the salaries of the officers and elect them. Thomas M. Scruggs and S. M. Nelson were members of the board of directors which fixed the salaries of the president and secretary, and which elected them to these offices, and it is satisfactorily shown that both were instrumental in fixing the amount to be paid, and in electing themselves to their respective offices. The pleadings ⁵³⁷ and evidence show that the board of directors consisted of seven members. In the seventh paragraph of the bill it is averred, that four members, to wit, H. B. Scott, S. M. Nelson, Thomas M. Scruggs and J. C. Eyster, met and re-elected Scruggs president at a named salary, J. C. Eyster vice-president, and S. M. Nelson secretary. Of necessity, Scruggs and Nelson voted for themselves. This averment is nowhere controverted. We are of opinion that the evidence leaves no room for reasonable controversy that the salaries voted to the president and secretary, when considered with reference to the duties required of and performed by them, and the financial condition of the corporation, were out of all proportion, and unreasonable. These salaries not only consumed all the income, but encroached annually upon the capital assets, and, if continued, would eventually leave nothing for the stockholders. The duty of a director is to act for the interest of the stockholders, and manage the affairs of the corporation for their bene-

fit, and not for his personal gain. There was a direct conflict between the duty owed by these directors to the stockholders, and their self-interest; and, as is frequently the case under such conditions, the frailty of human nature sacrifices duty to self-interest. They fixed the salaries at exorbitant prices, then elected themselves to the offices. The fact that the president may have been unwilling to accept the office at a less salary proves nothing in favor of the fairness and reasonableness of the amount. A minority stockholder who cannot obtain redress against such a wrong through the board of directors or the stockholders is entitled to the intervention of a court of equity: 1 Morawetz on Corporations, secs. 508, 518, et seq; Cook on Stocks and Stockholders, sec. 657, and notes.

This brings us to the consideration of a question which vitally affects complainants' standing in a court of equity. The respondents demurred to the bill upon the ground that the bill admitted that complainants had not applied to the board of directors or to the stockholders for redress, and failed to state sufficient reasons for not doing so. The demurrer was overruled, and the same question and issue was raised by answer. After careful consideration, we are of opinion that the court erred in its rulings upon the demurrer, and in its conclusion ⁵³⁸ from the facts bearing upon this issue. In the case of *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71, we used this language: "If it be supposed an unwise course is being pursued, or that the interests of the corporation are suffering, or likely to suffer, through the inefficiency or faithlessness of an official, an appeal should first be made to the directory or governing body to redress the grievance. Failing there, in ordinary cases the next redress will be found in the power of the ballot, which usually comes into exercise at short intervals. We will not say there may not be cases in which the strong, restraining arm of the chancery court may be invoked in the first instance. The whole governing force may become corrupt, or may enter into a combination, either *ultra vires*, or so destructive of the policy and property of the corporation as to show an appeal to the directory would be fruitless, and delay extremely perilous. It should be a strong case, however, to justify such interferences."

In the case of *Merchants' etc. Line v. Waganer*, 71 Ala. 581, we quoted approvingly from the case of *Hawes v. Oakland*, 104 U. S. 450, the following principles of law as applicable: "A stockholder could appeal to the courts for relief 'where the board of directors, or a majority of them, are acting for their own in-

terest, in a manner destructive of the corporation itself, or of the rights of the other shareholders.' This is precisely what is averred in this case. 'But,' Justice Miller adds, 'in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains; and he must show a case, if this is not done, ⁵³⁹ where it could not be done, or it was not reasonable to require it.' "

In the case of *Steiner v. Parsons*, 103 Ala. 215, after citing the foregoing authorities, it was held that mere averments of conclusions, without averment of the facts which sustained the conclusions, were insufficient. The reasons for the principle are so strongly and clearly stated in the cases cited that we consider it unnecessary to fortify them by additional argument or authority. It is a settled question in this court. The abstract abounds with averments that the directors were dominated by the president and secretary, and that an application to the board would have been useless; but with one exception to be noticed presently, there is not a single fact averred to show why the board of directors would not have interposed at the request of the complainants. The fact referred to is the statement that Thomas M. Scruggs, S. M. Nelson, and Kate Gutherz had the voting power to control the meeting of the stockholders and did dominate at these meetings. We observe here that this is the only material fact established by the evidence bearing upon this issue. The question then is, Does the fact that these three stockholders controlled the election of the seven directors and did elect them by their votes, without more, authorize the legal presumption that the directors thus elected would refuse to discharge their duties as directors to the corporation and the stockholders, when requested by the stockholders? The case of *Mack v. De Bardeleben Coal etc. Co.*, 90 Ala. 401, cannot be regarded as an authority. In the first place, the question was not before the court. In the second

place, the decision of the question was expressly pretermitted, and, arguendo, it was stated that possibly "the presumption would be, that he (a director) would exercise his power in the interest of the company to which he owed his election." There is no ground for such a presumption in the present case. The directors were stockholders. In the absence of causes to influence them otherwise, the presumption is that they would do their duty, and this presumption is greatly strengthened when the effect of duty was to promote their personal interest: *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 670. With the exception of the stockholders who as officers received salaries, the interest of the other members of the board of directors, as well as ⁵⁴⁰ their official duty, required a prompt interference to redress the wrong. The pleadings and evidence show that two of the directors are complainants. J. C. Eyster, M. R. Leadingham, and we presume H. B. Scott, together with Thomas M. Scruggs and S. M. Nelson, comprise the seven who constituted the board of directors. We find no averment in the bill that H. B. Scott, M. R. Leadingham, and J. C. Eyster, or any two of them, voted for the salaries, or for Scruggs as president and Nelson as secretary, nor do we find any sufficient averments in the bill to show that they, or at least two of them, would not have co-operated with the two members who are complainants in the present bill. We are satisfied that an application to the stockholders would have been a "vain and useless undertaking." It is clear that the president and secretary dominated the stockholders. If any further evidence than that already stated was needed on this point, it is to be found in the ratification by the stockholders at a meeting held since the beginning of this suit, at which the salaries fixed and the election and conduct of the president and secretary were approved. At this meeting, the president and secretary, voting their own stock and that of their relative Kate Gutherz, had no difficulty in obtaining a ratification of their own previous actions. This fact, however, did not relieve the minority stockholders from applying to the directors, unless there were other circumstances which relieved them from this duty. The bill and evidence is insufficient on this point. Ordinarily, we would render a decree here, annulling the decree of the court below, and dismissing complainants' bill, but we find difficulties owing to the condition of the case as presented in the abstract when submitted for final decree. In the beginning of the abstract it is stated that the bill is filed against the corporation and six named directors. Included in these named directors is Kate

Guthertz. The bill shows that Falk and Palm are also directors. This would make eight directors, yet the pleadings elsewhere and the evidence show that seven directors constituted the entire board. In the answers it is admitted that Kate Guthertz is a director as averred. Process is prayed against her as a respondent. The minutes of the stockholders' meeting held February 8, 1892, at which the directors were elected, who were in office at the time of ⁵⁴¹ the filing of the bill, does not show that she was elected a director, but names other seven. She was made a respondent to the bill. The abstract fails to show that as to her the case was at issue. She has not answered, and there has been no decree pro confesso against her. Again, the bill makes S. M. Nelson a material defendant, and the decree affects her personally. She has no answer on file. There is a mere reference in one place that she filed a plea of coverture, but this plea does not seem to have been considered by the parties or the court in any way. The abstract abounds in errors as to dates, some of which only we have been able to correct from other parts of the abstract. In this condition of the record, we have felt it our duty to reverse and remand the cause, and have stated the law applicable to the case, for the future guidance of the court.

Reversed and remanded.

CORPORATIONS—RIGHT OF STOCKHOLDERS TO ENJOIN ACTS OF OFFICERS—ATTORNEY'S FEES.—An injunction may issue on application of a stockholder to restrain the doing of some act by the officers of the corporation which if done would result in injury to the company: *Sherman v. Clark*, 4 Nev. 138; 97 Am. Dec. 516. See, also, extended note to *Hersey v. Veazle*, 41 Am. Dec. 367, as to when stockholders may maintain suits against officers and agents of corporations to call them to account or to set aside their acts: *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590. As to when attorney's fees will be allowed as an element of damages, see extended note to *Winkler v. Roeder*, 8 Am. St. Rep. 158-161.

CORPORATIONS—RIGHTS OF MINORITY STOCKHOLDERS AGAINST OFFICERS—WHAT FACTS MUST BE SHOWN.—Holders of a majority of the stock in a corporation have a right to control it, and the minority cannot interfere therewith unless they show some good reason for interference. They must establish by their complaint that they have exhausted all the means within their power to obtain redress for their grievances, or action in conformity with their wishes, and that their efforts to obtain redress at the hands of the other directors and stockholders have been earnest and faithful: *Alexander v. Searcy*, 81 Ga. 536; 12 Am. St. Rep. 337; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; 24 Am. St. Rep. 625, and note. But see *Eschweiler v. Stowell*, 78 Wis. 316; 23 Am. St. Rep. 411, where the wrong complained of resembled that in the principal case, and where a previous demand for redress upon the directors was held unnecessary.

SCATCHERD LUMBER COMPANY v. RIKE.

[113 ALABAMA, 555.]

SHIPPING—MARITIME LIENS—FEDERAL JURISDICTION.—If a maritime lien exists by reason of maritime law, as distinguished from a contract lien or lien given by state statute, the federal courts have exclusive jurisdiction, and no contract of the parties nor state statute declaring a lien in such cases and providing a remedy can oust the federal courts of their exclusive jurisdiction.

SHIPPING—MARITIME LIENS—STATE JURISDICTION.—In all cases where the federal courts have not exclusive jurisdiction, it is competent for the states to legislate relative to shipping contracts and torts, create liens upon vessels, boats, and instruments of water conveyance, even upon navigable rivers, and provide for the enforcement of such liens.

SHIPPING—MARITIME LIENS—RIGHT OF STATE TO CREATE.—A state statute creating a lien for materials and supplies furnished and work and labor performed in the original construction of a vessel or boat, or for repairs made upon it while in the home port, and providing for the enforcement of such lien, is valid and constitutional, for the reason that in such cases no maritime lien exists over which the federal courts have exclusive jurisdiction.

SHIPPING—MARITIME LIENS—BILL TO ENFORCE—JURISDICTION.—The home port of a vessel is where the owner resides, and a bill filed in a state court to enforce a lien given by statute for work done and material furnished in repairing a vessel while in the home port, which alleges that such work was done and material furnished in repairing the vessel while in the home port, but also alleges that the owners are nonresidents, and the evidence shows that the vessel plies on waters within the state, is insufficient to confer jurisdiction upon the state court.

Shelby & Pleasants, for the appellants.

S. P. Rather, for the appellee.

558 COLEMAN, J. Section 3054 of the code of 1886 reads as follows: "A lien is hereby created on any ship, steamboat, or other water craft, whether registered, enrolled, or licensed, or not, that may be built, repaired, fitted, furnished, supplied, or victualled, within this state, for work done or materials supplied by any person within this state, in or about the building, repairing, fitting, furnishing, supplying, or victualing such ship, steamboat, or other watercraft, and for the wages of the masters, laborers, stevedores, and shipkeepers of such ship, 559 steamboat, or other water craft, in preference to other liens thereon for debts contracted by, or owing from, the owners thereof; and such lien may be asserted in any court of competent jurisdiction."

The appellee, Rike, filed the present bill against the appellant, and prayed for the enforcement of the lien given by the foregoing section of the code upon the steamboat "William Towle." The bill prayed for a writ of seizure of the boat, but it does not

appear that any orders or proceedings were taken to seize the boat. The respondent, the lumber company, and Seward Cary, answered the bill of complaint, and filed separate demurrers. The chancery court granted relief to the complainant, and decreed, in default of payment a sale of the boat.

The principal question raised by the assignment of errors is one of the jurisdiction of the chancery court. The steamboat had been engaged in towing barges on the Tennessee river, which were loaded with logs, to the city of Decatur, situated in Morgan county, Alabama. The steamboat became badly out of repair, so much so that it was unfit for further service. In this condition it was brought to Decatur, and there the materials were furnished for repairs and services rendered which is the foundation of the bill of complaint. The bill avers, and it is not controverted, that complainant was employed by the general manager and agent of the Scatcherd Lumber Company, and his authority is not questioned. It is also shown that there was no definite price agreed upon, either for materials or for services performed. A part of these services consisted in the performance of the duties of "watchman." The precise duties of a watchman are not averred in the bill nor shown by the evidence. The general principles by which the jurisdiction of the federal and state courts over questions of maritime character are determined have been frequently declared, but difficulties in applying these principles to particular cases are continually presented, and the several courts have not been harmonious in applying admitted principles. At one time the jurisdiction of the federal courts as to rivers was limited by the ebb and flow of the tide, but now it extends over all rivers navigable and navigated in the interest of commerce. In all cases where jurisdiction is conferred by the constitution ⁵⁶⁰ of the United States and laws of Congress, the jurisdiction is exclusive, except that when the right may be enforced by the common-law remedy the party aggrieved may proceed with this remedy in any court having common-law jurisdiction. Where a maritime lien exists by reason of the maritime law, as distinguished from a contract lien or lien given by state statute, the federal courts have exclusive jurisdiction, and no contract of the parties nor state statute declaring a lien in such cases, and providing a remedy, can oust the federal courts of their exclusive jurisdiction. The effect of the decisions of the supreme court of the United States, construing the constitutional provision and laws of Congress, is, that where a maritime lien exists by virtue of maritime law, it is not in the power of states

to create a jurisdiction concurrent with the federal courts: *The Belfast*, 7 Wall. 624; 1 Am. & Eng. Ency. of Law, 194-198. We regard it equally well settled, and justly settled, that in all cases where the federal courts have not exclusive jurisdiction, it is competent for the state to legislate relative to shipping contracts and torts, create liens upon vessels, boats, and instruments of water conveyances, even upon rivers navigable, and provide for the enforcement of such liens. We are of opinion that, whenever a lien created by statute of a state is valid, it is competent for the same power to provide for its enforcement. It would seem illogical to concede the right of the state to create the lien, and deny it all power to provide a remedy: *Authorities supra*; *Gindele v. Corrigan*, 129 Ill. 582; 16 Am. St. Rep. 292; *State v. Voorhies*, 39 La. Ann. 499; 4 Am. St. Rep. 274; *Atlantic Works v. Glide*, 157 Mass. 525; 34 Am. St. Rep. 305.

If the complainant had pursued his common-law remedy against the respondent and acquired a lien upon its interest in the boat by the levy of an attachment, we are of opinion that, under the provisions of the law of Congress reserving to suitors this remedy, he might have prosecuted the suit to judgment and condemnation of the property levied upon. The purpose of the bill is to enforce the payment of a demand due from the defendant by an implied contract made with its agent, by enforcing the lien created by the state statute: Code 1886, sec. 3054. The proceeding is not strictly ⁵⁶¹ in rem against the boat, as such liens are enforced in admiralty. The bill makes the Scatcherd Lumber Company the debtor and defendant, and seeks to enforce the lien created by statute upon its property for the security of the demand, instead of making the boat itself the defendant, as would be the case in admiralty, to enforce the admiralty lien. The result, that is, the condemnation and sale of the boat for the payment of the debt, in either case is the same. The enforcement of the lien is a quasi proceeding in rem. If, by the maritime law, there exists a lien upon the boat for complainant's demand, which might be enforced in the federal courts by a direct proceeding in rem, the jurisdiction of the federal court is exclusive. But if there exists no maritime lien in favor of the complainant, then the statute is not obnoxious to the constitution of the United States or law of Congress, and the state court has jurisdiction if the complainant's claim is embraced within the provisions of the state statute. It is clear from the decisions that for materials and supplies furnished and work and labor performed in the original construction of a vessel or boat

there does not exist a maritime lien of which the federal courts have jurisdiction, and it seems well settled that this rule applies for materials and supplies furnished and repairs made and work and labor performed upon a vessel or boat in the home port: Authorities *supra*; 14 Am. & Eng. Ency. of Law, 410-420; *Clyde v. Steam Transp. Co.*, 36 Fed. Rep. 501; *Baizley v. The Odorilla*, 121 Pa. St. 231.

The bill avers that plaintiff's demand arose from services rendered and repairs made while the boat was at its home port. If the lien created by section 3054, *supra*, is applicable only to the building of ships, boats, water crafts, or to repairs made, materials and supplies furnished, or work done, while at the home port, we think the statute constitutional. When construed in connection with the history of its enactment, and the continued re-enactment of this section, we are of opinion that such was the intention of the legislature: See Code 1852, tit. 2, c. 8; Code 1867, tit. 2, c. 8; decision of supreme court of United States in case of *The Belfast*, 7 Wall. 624, in connection with chapter 5, tit. 2, part 3, of the code of 1886.

562 While the bill avers that plaintiff's demand arose while the boat was at its home port, it also shows that the owner, the Scatcherd Lumber Company, is a nonresident, and that Cary, the co-respondent, is a nonresident. The evidence shows that the boat plied the waters of the Tennessee river, a navigable stream, towing barges to Decatur, that it was at Decatur when the repairs were made and services rendered, that its owners are nonresidents. We cannot conclude, either from the averments of the bill, or from the evidence, that Decatur was the home port. The general rule is, that the home port is where the owners, or at least some part owner, has his home.

Under this view of the case, and the law as declared by us, there is but one conclusion, and that is, that complainant's case is not one provided for in section 3054 of the code under which it was brought, and that the chancery court was without jurisdiction. The bill must be dismissed.

Reversed and rendered.

SHIPPING—MARITIME AND CONTRACT LIENS—FEDERAL JURISDICTION—STATE STATUTES.—Where the admiralty jurisdiction of the United States courts attaches, it undoubtedly excludes the jurisdiction of the state courts, and a state cannot confer jurisdiction upon its courts in such cases: *Gindele v. Corrigan*, 129 Ill. 582; 16 Am. St. Rep. 292. and note. Contracts for the construction of vessels and watercraft, and for furnishing materials therefor before they are launched are nonmaritime. Liens, and proceedings to

enforce them are under state control and may be enforced in state courts: *Globe Iron Works Co. v. Steamer "John B. Ketcham, 2nd."* 100 Mich. 583; 43 Am. St. Rep. 464, and note. A state statute creating a lien against vessels for repairs made in their home port, where the maritime law does not give such a lien, and authorizing the enforcement of the lien in the courts of the state is valid: *Atlantic Works v. Tug Glide*, 157 Mass. 525; 34 Am. St. Rep. 305, and note.

SHIPPING.—A HOME PORT is any port in which the owner happens to be with his vessel; but in England a home port is any port within the jurisdiction of the common-law courts of that island, if the owner resides in that country: *Case v. Woolley*, 6 Dana, 17; 32 Am. Dec. 54.

RED MOUNTAIN MINING COMPANY v. JEFFERSON COUNTY SAVINGS BANK.

[113 ALABAMA, 629.]

JUDGMENTS BY CONSENT—CONCLUSIVENESS OF.—If a decree overruling a demurrer to a bill to foreclose a mortgage is, by consent of the parties, affirmed on appeal, the defendant cannot, on a subsequent appeal from the final decree of foreclosure, raise the same question presented by the demurrer.

MORTGAGES—REDEMPTION FROM TAX SALE BY MORTGAGEE—LIEN FOR AMOUNT PAID.—A mortgagee who, to protect his security, redeems the mortgaged land from a sale for taxes has a right on foreclosure to charge the land with the repayment of the amount so paid, in addition to the amount due on the mortgage.

Lane & White, for the appellant.

Ward & Campbell, for the appellees.

630 **COLEMAN, J.** The appellees filed their bill to foreclose a mortgage executed by the appellant upon certain real property. After the execution of the mortgage, the mortgagor permitted the property to be sold for taxes. In addition to the prayer for a foreclosure of the mortgage to satisfy the debt secured thereby, the complainants also prayed that the land be subjected to the payment of the 631 amount paid by them to redeem the lands from the purchaser at the tax sale. The respondent demurred to the bill generally, and specially to that feature of the bill which prayed for relief on account of the money paid to redeem the lands. The demurrer was overruled by the court, and the respondents appealed to this court from the decree overruling the demurrer. Upon the cause coming on to be heard in this court, "by consent of the parties it was considered that the decree of the chancery court be in all things affirmed." The present appeal is prosecuted from the final decree of the court, upon the execution of a reference by the register, in which the

complainants were granted relief for money paid out to redeem the lands, and appellants again seek to raise the same question presented by demurrer, and which by consent was adjudicated adversely to them on the former appeal from the ruling of the court upon demurrer. The former adjudication, by consent, is conclusive against them.

Independent of this, the taxes were a lien upon the land, and the mortgagee had the right to redeem the land to protect his own security. See the following authorities: *Kilpatrick v. Henson*, 81 Ala. 464; *Grigg v. Banks*, 59 Ala. 311; *Cowley v. Shelby*, 71 Ala. 122; 25 Am. & Eng. Ency. of Law, 415, note 4.

Affirmed.

JUDGMENT ON DEMURRER—CONCLUSIVENESS.—Final judgment on general demurrer, after the plaintiff has declined to amend, precludes him from recovering upon the same cause of action in another suit: *Scherff v. Missouri Pac. Ry. Co.*, 81 Tex. 471; 26 Am. St. Rep. 828, and note; *Kleinschmidt v. Binzel*, 14 Mont. 31; 43 Am. St. Rep. 604, and note.

MORTGAGES—PURCHASE BY MORTGAGEE AT TAX SALE OF MORTGAGED PREMISES.—When a mortgagor neglects to keep down the taxes on the mortgaged premises, the mortgagee, although there is no provision therefor in the mortgage, may pay them, and may redeem from a tax sale, and add the amount to the mortgage debt: *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163; *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729, and note. See extended note to *Blake v. Howe*, 15 Am. Dec. 687.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

BARNES v. GLIDE.

[117 CALIFORNIA, 1.]

MANDAMUS—LIMITATIONS.—A proceeding in mandamus between private parties to enforce a moneyed obligation, where there is no statutory provision giving it a different character, is generally considered an action at law, in which case the ordinary rules of practice, including the statute of limitations, apply.

LIMITATIONS.—MANDAMUS TO COMPEL THE PAYMENT OF SWAMP LAND WARRANTS will not issue where such warrants have been drawn for more than fourteen years, and the longest period allowed by the code for bringing a civil action, other than for the recovery of real property, is four years.

LIMITATIONS—DEMAND.—Though a demand is necessary to perfect a cause of action, a party interested cannot prevent or postpone the running of the statute of limitations by his failure to make a demand.

Albert M. Johnson and William Gwynn, for the appellant.

A. J. Bruner, Robert T. Devlin, McKune & George, and John T. Harrington, amicus curiae, for the respondent.

³ **McFARLAND, J.** The plaintiff filed a petition or complaint in the superior court, in which he asked for a writ of mandate to be directed to the defendants, Swamp Land District, No. 307, and J. C. Glide, Francis T. Dwyer, and Joseph L. Monica, the present trustees of said district, commanding them "to proceed to have an assessment levied upon the lands in said district sufficient to pay, and for the purpose of paying," certain warrants described in the complaint. The defendants filed a demurrer to the complaint. The demurrer was both general and special, and it was sustained by the court below, and judgment

rendered for defendants. From this judgment the plaintiff appeals.

The complaint contains quite a number of counts, but they are all alike, except that a different warrant is described in each count. The first count is a sample of them all. In that count it is averred that Swamp Land District No. 307 was duly organized in September, 1877, and has ever since been an existing corporation; that the other defendants, Glide, Dwyer, and Monica, are now, and for more than six months last past have been the duly elected and acting trustees of said district; that on the tenth day of September, 1877, the said district, through its then board of trustees, issued to H. M. Hawley & Co. its certain warrant, numbered 23, upon the treasurer of Yolo county, in which county the district is situated, directing said treasurer to pay to said Hawley & Co., or order, "from the Swamp Land Fund in the treasury of said county to the credit of said district No. 307, the sum of three hundred and seventy-two dollars ⁴ and ninety-six cents"; that the said warrant was presented to the board of supervisors of said county, and was by them approved, and was thereafter presented to the treasurer of said county, and was by him, on the twelfth day of November, 1887, marked, "not paid for want of funds," and registered; that since the issuance of said warrant there never has been in the treasury of said county, to the credit of said Swamp Land District, or in the funds of said district, sufficient money with which to pay said warrant, or any interest thereof, and that there never has, during any of said time, been any money whatever in said treasury to the credit of said district, except only the sum of three hundred and eighty dollars, which remained in the treasury for fourteen days, and was paid out upon another warrant; that prior to the first day of November, 1895, the said Hawley & Co. assigned said warrant to plaintiff, who is now the owner and holder thereof; that on the fifth day of November, 1895, the plaintiff demanded, in writing, of defendants that they provide for the payment of said warrant; that the defendant failed and neglected to pay said warrant, or to provide for the payment thereof, or to comply with the demand aforesaid, and no part thereof has ever been paid, but the whole thereof "is due, owing, and unpaid from the said Swamp Land District No. 307 unto this plaintiff." The prayer is, that the defendants be required "to proceed to have an assessment levied upon the land in said district sufficient to pay, and for the purpose of paying, each and every warrant hereinbefore described, and all interest due thereon, and to collect all taxes

thereon, and to pay all taxes and moneys so collected into the treasury of the county of Yolo," etc. There is also an averment, "upon information and belief," that the defendants have moneys in their hands belonging to said district, and a prayer that they pay the same into the treasury of said Yolo county; but, as no point is made in the briefs as to this averment, and as it is evidently considered by the parties as unimportant, it is not necessary to consider it.

⁵ The defendants, in their demurrer, set up the statute of limitations, and particularly sections 337, 338, 339, and 343 of the Code of Civil Procedure; they also pleaded by the demurrer that the complaint did not state facts sufficient to constitute a cause of action; and these two grounds of demurrer are the only ones discussed by counsel.

Counsel for respondent strenuously contend that the thing which plaintiff seeks to have defendants compelled to do is not a duty "which the law specially enjoins as a duty resulting from the office, trust, or station"; that the law does not specially enjoin the defendants to have an assessment levied upon the land in said district, and, particularly, that it is not their special duty to have such an assessment levied for the purpose of paying the warrants, or either of them, mentioned in the complaint. This and many other points are pressed by respondents under that part of their demurrer which asserts that the complaint does not state facts sufficient to constitute a cause of action; but we do not consider it necessary to inquire particularly into these points, because, in our opinion, the proceeding is barred by the statute of limitations.

A proceeding in mandamus between two private parties to enforce a money obligation, where there is no statutory provision giving it a different character, is generally considered as a mere action at law, in which case all ordinary rules of practice, including the statute of limitations, apply. In *Commonwealth v. Dennison*, 24 How. 97, the supreme court of the United States say: "It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process ⁶ in cases to which it has application. It was so held by this court in the cases of

Kendall v. United States, 12 Pet. 615; Kendall v. Stokes, 3 How. 100." In New York, before the adoption of the code, and when there seemed to be no provision of the statute of limitations expressly applicable to proceedings in mandamus, the court held, in *People v. Supervisors of Westchester*, 12 Barb. 446, that a proceeding in mandamus should by analogy be commenced within "the time given by the statute to obtain a remedy for injuries substantially of a similar character in the ordinary way, if that could be pursued"; and, in *People ex rel. Byrne v. French*, 12 Abb. N. C. 156, the court alluded to the former case of *People v. Supervisors of Westchester*, 12 Barb. 446, as founding the doctrine of limitation upon analogy, but said that, "whether the proceeding then under review was to be considered as an action under section 3333 of the New York code, or a special proceeding under section 3334 of that code, the result would be the same, because, by section 414 of the code, the rules of limitation were made applicable to special proceedings as well as civil actions." Our code has substantially the same provisions as section 414 of the New York code. Section 1109 of the Code of Civil Procedure, which is a part of the title under which writs of mandate, certiorari, and prohibition are provided for, reads as follows: "Except as otherwise provided in this title, the provisions of part 2 (section 307 to section 1059) of this code are applicable to, and constitute the rules of, practice in the proceedings mentioned in this title"; and part 2, from said section 307 to said section 1059, includes the provisions of the code upon the subject of the limitations of actions. Moreover, section 363 of the Code of Civil Procedure, which is the closing section of the title, "Of the time of commencing actions," reads as follows: "The word 'action,' as used in this title, is to be construed wherever it is necessary so to do as including a special proceeding of a civil nature." Therefore, it is quite clear that, not only under the general authorities, but under the provisions of our code, a proceeding like ⁷ the one at bar in mandamus is subject to the rules which govern the limitations of actions; and if the present proceeding is not subject to section 337, section 338, or section 339, it is certainly subject to the provisions of section 343, which declares that: "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." The reason and philosophy upon which the statute of limitations is based apply here with full force. The warrant set up in the first count of the complaint was issued, presented, and payment thereon was refused, in No-

vember, 1877; and this present suit was not commenced until November, 1895, which was eighteen years thereafter. The date of the latest warrant set up in the complaint is 1881, more than fourteen years before the commencement of the action. The present board of trustees, who are made defendants, do not appear to have occupied that position for a longer period than six months prior to the commencement of the suit. The warrants sued on were issued, if at all, by other trustees who were in office from fifteen to eighteen years before this proceeding was instituted. They may have been issued illegally; the act of issuing them may have been ultra vires; they may not have been issued for any labor done in the construction of the works of the district; they may have been issued without consideration and fraudulently; they may be forgeries. And it is quite evident that the present defendants, after such a lapse of time, would be in no condition to make any of the defenses above indicated, when witnesses who knew of the facts at the time may be dead, or may have allowed the recollection of them to vanish from their memories. And the evident purpose of the statute of limitations is to prevent such a condition of affairs, and to preclude parties from disturbing that repose which is intended to be final, after the lapse of certain periods of time designated in the statute itself. The position cannot be successfully maintained that no action could be commenced until a demand ^s had been made by plaintiff upon the defendants to act. Whether such demand be necessary in a case like the present it is not necessary to determine; for the demand itself was an act within the power of the plaintiff. In *Prescott v. Gonser*, 34 Iowa, 179, the court say: "That the action of mandamus cannot be maintained until there has been a refusal to perform the official duty sought to be enforced is true, but to hold that a plaintiff who has a right to demand performance at any time may delay such demand indefinitely would enable him to defeat the object and purpose of the statute. It is certainly not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled for even fifty years unaffected by the statute of limitations, thereby rendering it a dead letter. In such a construction of the statute we cannot concur." See, also,

to the same effect, *Baker v. Johnson County*, 33 Iowa, 151. If the facts stated in the complaint in the case at bar constitute a cause of action, they constitute a cause of action which accrued, and for which an action might have been instituted, from fourteen to eighteen years before the present complaint was filed. The statute of limitations is intended to embrace all causes of action not specially excepted from its operation; and there is no exception applicable to the present proceeding. *Bates v. Gregory*, 89 Cal. 387, was an application for a writ of mandate to compel the trustees of the city of Sacramento to do certain acts; the defendants therein set up the statute of limitations; and this court said: "A municipal corporation has the legal right to avail itself of the defense of the statute of limitations as fully as any other creditor. It is a privilege personal to the debtor, and whenever, in any legal proceeding, it is invoked by the debtor, the court is compelled to recognize ⁹ it as a proper defense. This defense is pleaded in the present proceeding, and, as we have before shown, is sustained by the facts, and must therefore be held sufficient." Appellant relies greatly on *Freehill v. Chamberlain*, 65 Cal. 603; but that case is not pertinent to the case at bar. That case was simply mandamus to the treasurer of the city of Sacramento to compel him to pay the interest on certain bonds. Those bonds had been issued by the city under the act of April 24, 1858 (Stats. 1858, p. 280), which has frequently been held by this court to constitute an express contract between the city and the bondholders, by which the latter were prohibited from suing the city, and were to rely exclusively upon a certain special fund distinct from the general fund and from all other funds of said city. The only remedy which the bondholders had was mandamus against the city treasurer to compel him to pay the interest on the bonds when there was money in the fund to which they could alone look under their special contract; and all that the court decided in *Freehill v. Chamberlain*, 65 Cal. 603, was that no cause of action in mandamus against said treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced fifteen years before it was instituted.

The judgment is affirmed.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

MANDAMUS—LIMITATION OF ACTIONS.—A proceeding by mandamus is an action at law, and may be barred by the statute of limitations: *State v. School Dist.*, 30 Neb. 520; 27 Am. St. Rep. 420, and note. A proceeding by mandamus to recover public money withheld by a public officer after the expiration of his term of office is barred by the statute of limitations after the expiration of the time named therein, computed from the time when the right of action accrued: *State v. King*, 34 Neb. 196; 33 Am. St. Rep. 635.

LIMITATION OF ACTIONS—DEMAND—WHEN INDISPENSABLE.—If a demand on the defendant, or other collateral thing, is requisite to give a right of action to the plaintiff, the statute does not begin to run until such demand is made or thing done: *Wright v. Hamilton*, 2 Ball. 51; 21 Am. Dec. 513; *Sherrod v. Woodward*, 4 Dev. 360; 25 Am. Dec. 714. But after a great length of time, a demand will be presumed: *Hamilton v. Hamilton*, 18 Pa. St. 20; 55 Am. Dec. 585; *Collard v. Tuttle*, 4 Vt. 491; 24 Am. Dec. 627. A party cannot prevent the running of the statute by omitting to do some act which he might have done or which he is required by law to do: *Reizenstein v. Marquardt*, 75 Iowa, 294; 9 Am. St. Rep. 477.

THRESHER v. ATCHISON.

[117 CALIFORNIA, 73.]

CONSTITUTIONAL LAW—REDEMPTION, STATUTES PURPORTING TO AFFECT.—After a sale has been made under execution, the rights of the purchaser and the judgment debtor are fixed as by contract, and the legislature cannot subsequently authorize a redemption after a longer time, or for a less sum, than was required by the law in force when the sale was made.

A. F. Jones, for the appellants.

John Gale, for the respondents.

⁷³ **HARRISON, J.** By virtue of an order of sale issued upon a judgment entered in the superior court for Butte county for the foreclosure of a mortgage upon certain lands, and their sale in satisfaction of the mortgage debt, the defendant Atchison, who had been appointed by the court a commissioner therefor, sold the lands March 23, 1895, to his codefendant, Green, for the sum of eight thousand dollars, and issued to him a certificate therefor. September 22, 1895, the plaintiffs herein, who were entitled to redeem the lands from said sale, tendered to the commissioner for that purpose the sum of eight thousand four hundred and seventy-four dollars and sixty-seven cents. The commissioner refused to receive that amount in redemption thereof, and threatened to execute a conveyance of the lands to the purchaser, unless they should be redeemed from the sale by the payment to him of eight thousand nine hundred and forty-nine dollars and thirty-five cents before the time for redemption

should expire. ⁷⁴ The plaintiffs thereupon paid to the commissioner the sum demanded by him, under their protest that the amount was illegal and excessive to the extent of four hundred and seventy-four dollars and sixty-eight cents. The present action was brought to recover the last-named amount, upon the ground that it was in excess of what the commissioner was authorized to demand. Judgment was rendered in favor of the plaintiffs for the sum of two hundred and ninety-six dollars and ninety-five cents, from which the defendants appeal.

At the date of the sale it was provided by section 702 of the Code of Civil Procedure that a redemption from the sale might be made within six months by paying to the purchaser "the amount of his purchase, with two per cent per month thereon in addition up to the time of redemption," with any taxes or assessment that he might have paid after his purchase. By an amendment of this section passed March 27, 1895 (Stats. 1895, p. 225), and which went into effect sixty days thereafter, it was provided that the redemption might be effected by paying the amount of the purchase, "with one per cent per month thereon in addition up to the time of redemption," with whatever taxes and assessments might have been paid by the purchaser; and the question presented upon this appeal is the effect to be given to this amendment. The theory of plaintiffs, as shown by their complaint, is that the provisions of the amended section alone are to be considered, while the defendants contend that the section as it stood at the date of the sale determined the rights of the parties. The court held that the provisions of the original section prevailed until the amendatory section took effect, and that thereafter the amended section alone was to be considered.

It has been frequently held that a law extending the time within which a redemption may be made from a sale under a judgment will be inoperative upon a sale made prior to the passage of the act; that the purchaser at the sale acquires rights thereby of which he cannot be divested by subsequent legislation. Cooley, in his treatise on Constitutional Limitations, page 353, says: "A law is void which extends the time for the redemption ⁷⁵ of lands sold on execution, or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time when provided by the law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for payment of a promissory note." Mr. Freeman, in his treatise on

Executions, section 315, in discussing the effect upon the rights of the judgment debtor of a statute authorizing a redemption from a sale passed after the sale has been made, says: "But the right of the purchaser to a conveyance, or to repayment at the termination of the period allowed for redemption, is deemed to rest upon a contract which the legislature will not be permitted to impair. Hence, while the time for redemption may probably be shortened, it certainly cannot be prolonged by any law enacted after the sale." The same principles which render void an act extending the time for redemption after the sale has been made will render void an act reducing the amount of money required for a redemption from such sale. The sale by the sheriff is regarded as a sale by the judgment debtor (*Blood v. Light*, 38 Cal. 658; 99 Am. Dec. 441); and the purchaser is entitled to rely upon the statutory provisions for redemption existing at the time of the sale to the same extent, and in the same manner, as if they were incorporated into a contract of sale executed by the debtor.

Section 700 of the Code of Civil Procedure declares that: "Upon a sale of real property, the purchaser is substituted to, and acquires, all the right, title, interest, and claim of the judgment debtor thereto," subject to redemption, as provided in the succeeding sections. Section 701 provides that property sold subject to redemption may be redeemed "in the manner hereinafter provided." At the time of the sale in question it was provided by section 702 that, in order to effect a redemption, the purchaser should be paid the amount ⁷⁶ of the purchase, with two per cent per month until the time of redemption. This provision in the section formed an element in the purchase at the sale, and constituted a term in the contract under which the purchaser paid his money to the officer. At the time he made his purchase the statute provided that, at the expiration of six months thereafter, he should receive a conveyance of the land, unless it should, before that time, be redeemed from the sale by the payment to him of the amount of his purchase, with two per cent per month until the time of such payment. The legislature was as powerless to diminish the amount which he should receive as a redemption from the sale as it was to extend the time at which he should be entitled to a conveyance, and take possession of the land. It could with as much right authorize a redemption without requiring any payment beyond the amount of the purchase as it could reduce the amount then required to be paid. By his purchase, the defendant, Green, became vested with an in-

terest in the land, of which he could be deprived only in the mode then fixed by the statute, and the plaintiffs were entitled to redeem the land from the sale only upon paying the amount of his purchase, with two per cent per month from the date of the sale until the time of redemption. As it appears from the complaint that that is the amount which the commissioner demanded, and which they paid for the purpose of redemption, the demurrer to the complaint should have been sustained.

The judgment is reversed, with directions to the superior court to sustain the demurrer to the complaint.

Garoutte, J., and Van Fleet, J., concurred.

STATUTES CHANGING LAW AS TO REDEMPTION—Statutes creating a right to redeem may be altered. This right is the creature of the statute, relating to the remedy, and is not so essential to a contract right as to be entirely beyond legislative control: *Anderson v. Anderson*, 129 Ind. 573; 28 Am. St. Rep. 211, and note. But an act providing for the redemption of real property sold upon execution, so far as the same is intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is in conflict with the federal constitution which prohibits the passing of any law impairing the obligation of contracts: *Scobey v. Gibson*, 17 Ind. 572; 79 Am. Dec. 572, and extended note. See *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266; *Oullahan v. Sweeney*, 79 Cal. 537; 12 Am. St. Rep. 172.

WELLS v. BLACK.

[117 CALIFORNIA, 157.]

SAVINGS BANKS, DEPOSITORS, RELATION TO.—If a corporation organized as a savings bank and having a capital stock receives deposits which, under the by-laws, consist of two classes, one payable six months after demand, and the other at longer or shorter periods after demand, depending upon the amount to be withdrawn, the depositors receiving such interest as the board of directors determine, and the remaining profits belonging to the stockholders, the relation of debtor and creditor exists between the corporation and its depositors, and its stockholders are answerable for their proportion of the indebtedness due such depositors.

SAVINGS BANKS—WAIVER OF LIABILITY OF STOCKHOLDERS.—A stipulation printed at the head of a signature book of a corporation purporting to release its stockholders from liability, and to assent to certain terms upon which loans and deposits will be repaid, is not binding upon the depositors, where they sign their names in the signature book without any intention of becoming bound by the agreement, and without knowledge of its contents.

CORPORATIONS—BY-LAWS LIMITING LIABILITY OF STOCKHOLDERS.—A by-law of a corporation seeking to limit the liability of its stockholders to its creditors contravenes the constitution and law of the state, and is therefore void.

CORPORATIONS. STOCKHOLDERS' LIABILITY. WHEN ATTACHES—LIMITATIONS.—The liability of the stockholders in

a savings bank to its depositors is incurred at the time of each deposit, and expires by the statutes of California at the end of three years.

McNealy & Whitehead, M. A. Luce, and E. Parker, for the appellants.

Bryant Howard, appellant in person.

S. F. Liebe, for appellant Mabury.

Works & Works, for respondent.

C. H. Rippy and Withington & Carter, amici curiae, for depositors not represented.

¹⁵⁹ HENSHAW, J. Plaintiff, as a depositor in the Savings Bank of San Diego, a corporation organized under the laws of this state, and as assignee of the claims and demands of other depositors therein, sued defendants ¹⁶⁰ to enforce their constitutional and statutory liability as stockholders of the bank.

Judgment passed for plaintiff, and from this and from the order denying them a new trial defendants appeal.

The propositions for which they contend may be thus stated:
1. The bank of which defendants were stockholders was a savings bank, and deposits therein did not create corporate debts or liabilities; 2. If, however, a stockholder's liability exists for such deposits, that liability was waived by the depositors in this case; 3. In any event that liability is barred by the statute of limitations upon all deposits made more than three years before the commencement of this action.

1. The Savings Bank of San Diego was organized under the provisions of part 4, title 10, of the Civil Code. The corporation had a capital stock and stockholders. Under the by-laws, term deposits were payable six months after demand, and ordinary deposits at longer or shorter periods of time after demand, dependent upon the amount to be withdrawn. The depositors received such interest as the board of directors might determine. After paying interest to depositors, the remaining portion of the profits belonged to the stockholders.

We need not discuss at length the broad differences which exist between a savings institution, such as the San Diego corporation, and a savings bank in its original conception, where depositors shared proportionally in profits and losses, and where the managers of the funds were but the trustees and agents of the members. In the latter, the relation of debtor and creditor does not exist between the corporation and its depositors. In

the former, it generally does. The question has received detailed consideration in the case of *Los Angeles v. State Loan etc. Co.*, 109 Cal. 396. It was there held, under a state of facts substantially the same as these here presented, that the relation of debtor and creditor arose upon deposits in such a savings bank. It is said: "It is, therefore, apparent that a deposit in a savings bank ¹⁶¹ having a capital stock may be a debt against the corporation, and, indeed, must be, since the corporation is formed by the stockholders, and the depositor deals with the corporation, not as his agent, for whose mistakes or defalcations he is responsible, but as a principal pledging its stock and assets for the security of the depositor. Not so, however, with the savings banks of the other class which has no capital stock, and in which the depositors are members of the corporation."

This statement, however, should not be misunderstood. It is a holding that, under the law, unmodified by special contract, the relation of debtor and creditor exists between such a savings institution and its depositors. It is not to be construed as a declaration that this relation may not be changed by agreement of the parties.

It results, therefore, that the relation of debtor and creditor existed in the present case. From this follows, of necessity, the liability of the stockholder for his proportion of the debt, saving as that liability may have been modified or waived by contract of the parties. For, that this may be done, there can be no question: *French v. Teschemacher*, 24 Cal. 558; *Sedgwick on Statutory and Constitutional Law*, 111. This brings us to the consideration of proposition—

2. The waiver insisted upon is twofold: 1. By the terms of the by-laws, assented to by the depositors; 2. By positive agreement, signed by them. The by-law relied upon is not in strictness a by-law at all. By-laws are the body of rules laid down for the government of a corporation, its officers and stockholders, in the conduct of its affairs. This so-called by-law is merely a form of agreement couched in the first person, presumably to be assented to in some formal way by a depositor—though this is not made to appear. In and of itself it is not binding upon anybody. It reads as follows: "In consideration of the receipt by the Savings Bank of San Diego County of the deposits now made and hereafter to be made by me with it, I do ¹⁶² hereby, for myself, my heirs, executors, administrators, and assigns, covenant, promise, and agree to and with said Savings Bank of San Diego County, to be governed in all respects in regard to all moneys

which may be deposited by me with said corporation by the conditions above written, and by its by-laws, and that all moneys now or hereafter to be deposited by me with said Savings Bank of San Diego County shall be reimbursable only out of the first disposable funds that shall come into the hands of said Savings Bank of San Diego County after the date of my demand for the reimbursement thereof, and after the payment of all sums for the reimbursement of which demand shall have been made prior to the date of my demand, as provided for in the foregoing conditions. And further, I waive any and all claim or claims, whether founded upon the statutes or upon the constitution of the state of California, which without this stipulation I might have to hold any individual corporator or corporators, officers, members, or stockholders of this corporation, or his, her, or their heirs, executors, administrators, or assigns, personally liable, jointly or severally, for any losses, and I consent to look for my security solely to the capital stock and the assets of the corporation."

Had the depositors signed this, or in any other equally effective manner agreed to its terms, a different question would be presented. It was printed, it is true, with the by-laws in each depositor's book, and following it was a formal agreement to be signed, but this agreement was not in fact signed by any of the plaintiff's assignors.

Nor is the position of appellants bettered if the provision above quoted be treated as a by-law. It would then be a by-law asserting that the stockholders of this corporation were not held to their constitutional liability. But corporations may make only such by-laws as are consistent with the constitution and laws of the state: Civ. Code, sec. 301; Cook on Stocks and Stockholders, sec. 700 a, and note. Such a by-law clearly ¹⁶³ contravenes them, and is therefore void. Being void, it carried no notice to and had no binding force upon depositors. Not that the corporation could not on behalf of its stockholders contract for a waiver of their liability. As has been said before, it could; but such a contract cannot find its sole expression in a void by-law.

The second ground of waiver rests upon the following facts: Depositors were, as is usual, called upon to write their names in a book designated "Signature book." At the top of each page of this book was printed matter, headed "Agreement." Below this printed matter were ruled lines extending across the entire page, and under these the page was spaced and divided by perpendicular lines. The top of each space bore appropriate and directing words, viz., "Number," "Date," "Name," "Signature," "Re-

marks." The printed matter, with other things, contained in its last line a release of the stockholders from liability. Upon this question it is enough to say that the court found, upon sufficient evidence, that the depositors in writing their signatures upon the book did not sign or become bound by the printed agreement. There is thus presented, not the case of one who knowingly signs an agreement heedless of its contents. The finding of the court is that the plaintiff's assignors merely wrote their names in the signature book, and did not at all subscribe to the agreement.

3. Since the relation of debtor and creditor existed between the bank and its depositors, it follows that the debt was created and the liability incurred at the time of the acceptance of each deposit. At the expiration of three years the right to enforce the stockholders' liability was at an end: Code Civ. Proc., sec. 359; *Hunt v. Ward*, 99 Cal. 612; 37 Am. St. Rep. 87; *Bank v. Pacific Coast S. S. Co.*, 103 Cal. 594. Whatever divergence of views may be found in the earlier adjudications, the cases above cited contain the last expressions of the court upon the question. It follows, therefore, that plaintiff's cause of action is barred as to all deposits ¹⁶⁴ made more than three years before the commencement of the action.

The judgment is ordered modified to conform to these views, appellants to have their costs upon appeal.

Temple, J., McFarland, J., Van Fleet, J., Garoutte, J., and Harrison, J., concurred.

Rehearing denied.

BANKS AND BANKING—RELATION BETWEEN BANK AND DEPOSITOR.—A deposit of money made with a banking corporation or association, to be used by it for the purpose of making profit therefrom, with an agreement on its part to repay the amount with interest, becomes at once the property of the depositor, and creates the ordinary relation of debtor and creditor between the depositor and depositor: *Leaphart v. Commercial Bank*, 45 S. C. 503; 55 Am. St. Rep. 800, and note. The same relation is created by a general deposit: *Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note.

BANKS AND BANKING—SAVINGS BANKS—BY-LAWS OF—WHEN DEPOSITOR IS BOUND.—A depositor, by receiving and holding a deposit-book as his voucher against the bank, and continuing his relation of depositor without signing such book as required by the by-laws printed therein, of which he has actual knowledge, will be deemed to have assented to them as a part of his contract of deposit: *Gifford v. Rutland Sav. Bank*, 63 Vt. 108; 25 Am. St. Rep. 744, and note. See, also, *Kimins v. Boston etc. Sav. Bank*, 141 Mass. 33; 55 Am. Rep. 441.

CORPORATIONS—POWER TO MAKE BY-LAWS.—The power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the state. It can make no rule contrary to

law, good morals, or public policy: Monographic note to People's etc. Bank v. Superior Court, 43 Am. St. Rep. 153. See, also, extended note to Sayre v. Louisville etc. Assn., 85 Am. Dec. 618.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—BANK DEPOSITS—LIMITATION OF ACTIONS.—In California, an action to enforce the liability of stockholders of a corporation must be brought within three years after the cause of action accrues: Hyman v. Coleman, 82 Cal. 650; 16 Am. St. Rep. 178, and note. In Georgia, it is held that when a deposit in a bank is general, with nothing fixing any time or term for its repayment, the statute of limitations does not commence to run in favor of the bank until after demand and refusal to pay, provided they occur within a reasonable time, and before the right to demand the deposit has become stale: Munterlyn v. Augusta Sav. Bank, 88 Ga. 333; 30 Am. St. Rep. 159. The same is held in Girard Bank v. Bank of Pennsylvania Tp., 39 Pa. St. 92; 80 Am. Dec. 507, and note. See monographic note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 372.

PEOPLE v. LEWIS.

[117 (CALIFORNIA, 186.)]

MURDER.—AN INSTRUCTION to the jury that if, from the evidence, they believe that, without any physical act or demonstration on the part of the decedent, sufficient to warrant him as a reasonable man in the belief that he was in great bodily danger, fired the fatal shot at, and killed, the decedent, such killing was not justifiable, correctly states the law, and is applicable to the evidence in the case, if one of the witnesses testifies to facts making it pertinent, though his testimony is contradicted by that of several others.

MURDER — SELF-DEFENSE.—NO RETREAT IS REQUIRED of one who is not the aggressor. A true man who is without fault is not obliged to flee from an assault of one who, by violence and surprise, maliciously seeks to take away his life, or to do him enormous bodily harm.

MURDER.—A PERSON ASSAILED IN HIS OWN HOUSE OR PREMISES can repel force by force, and is not obliged to retreat, but may pursue his adversary until he has secured himself from danger, and if, in a conflict between them, he happens to kill, the killing is justifiable.

Clay W. Taylor and J. Chadbourne, for the appellant.

W. F. Fitzgerald, attorney general, and Charles H. Jackson, deputy attorney general, for the respondent.

187 HENSHAW, J. The defendant was prosecuted for the murder of William H. Farrell, and was convicted of manslaughter. He appeals from the judgment, and from the order denying him a new trial.

Defendant was the husband of Farrell's sister, and with his wife and nine years' old son, was living upon a mountain ranch in Shasta county. Farrell, though he was a not infrequent vis-

itor at his brother in law's house, was ill-disposed toward him. His grievance was founded upon a claim of moneys due him from Lewis for services, and there is much evidence of oft-repeated ¹⁸⁸ threats upon his part, couched in most abusive language, "to maul Lewis," "to stamp his God damned guts out," "to fix him," and "to kill Lewis, or Lewis would kill him." Some of these threats had been uttered to defendant himself, in the presence of his wife. Others had been communicated to him. Farrell was the younger, stronger, and more active of the two.

Upon the day before the homicide, Farrell, stopping at defendant's home, told his sister that one John Miller, at a rodeo, had recently said in his presence, and in the presence of others, that Frank Lewis had stolen his hogs, and had stolen the salt to salt them with. Farrell had then left the house, and gone on to spend the night with one William Wagner, a boy of seventeen years, who was camping a short distance away from defendant's home.

Wagner broke camp the following morning, and, by previous arrangement with defendant, brought his camping utensils for storage to Lewis' house. He was accompanied by Farrell. The two arrived shortly before 8 o'clock in the morning, and were hospitably received by Mr. and Mrs. Lewis. They had delayed breakfast for them and invited them to the meal. The young men, however, had eaten their breakfast before breaking camp, and so declined the invitation, and sat down in the door of the front room of the house, while the Lewis family went to their morning meal in the kitchen. Farrell and Wagner both carried rifles. Lewis had taken Wagner's rifle while helping him to dismount and unpack, and had placed it in the kitchen. Farrell put his rifle inside the door, near the threshold of which he was sitting. An open door between the room in which the young men sat and the kitchen where the family were at breakfast permitted conversation. At the table were the Lewises, husband, wife, and son, and Dan Nichols, a half-breed Indian boy, nine years old.

The Lewises asked young Wagner if he had been at the rodeo, and had heard Miller charge Lewis with the theft of his hogs. Wagner replied that he had been at ¹⁸⁹ the rodeo, but had not heard Miller's accusation. Either Mr. or Mrs. Lewis then asked Farrell who beside himself had heard it. He answered, giving several names, and wanted to know if his word was doubted, and if his word was not good enough for Lewis. Lewis replied that of course Farrell's word was good, but he wanted to have some

one else corroborate it, so that when he went for Miller, if Miller should deny it, it would not rest simply upon Farrell's statement against Miller's. Farrell became angry, and began to abuse Lewis, saying he was not big enough to dispute his word; if he wanted to dispute his word, to come out and settle. Lewis answered that he did not have to come out, and Farrell retorted that he would make him. Lewis then said he wanted no trouble, and Farrell replied that he was going to have trouble. Lewis arose from the breakfast table and passed into the front room. As he did so, Farrell stepped out of the front door and picked up an iron bound singletree. Lewis stopped in the front door and told Farrell to leave the ranch, that he wanted no trouble. Farrell replied that he would not leave, and could not be put off, and challenged Lewis to come out. Lewis asked what he meant to do with the singletree, and Farrell replied that he would show him. Then, according to the testimony of Wagner, Lewis picked up Farrell's rifle standing inside the door, and saying: "Damn you, I will learn you to fight me," fired, and Farrell, who was standing eight or ten feet away, fell to the ground. According to the testimony of Mr. and Mrs. Lewis, Farrell, when asked the last time what he meant to do with the singletree, said: "I will beat your brains out, you damned son of a bitch; I will beat your brains out," and advanced upon Lewis with the weapon raised. Lewis seized the rifle and fired when Farrell was nearly or actually within striking distance. Farrell "swung around," dropped the singletree, recovered himself and came into the house, calling upon Wagner to give him his gun. Lewis left the house. Farrell seized Wagner's rifle, ¹⁹⁰ which was in the kitchen. Mrs. Lewis struggled with him for its possession. Farrell visibly and speedily weakened from his wound, and finally ceased the struggle and was put to bed by his sister. Wagner and the Indian boy were sent for assistance. Mrs. Lewis went out to meet her husband, leaving her own little boy to attend his uncle. While she was gone, Farrell, with his pocket knife, cut his own throat.

He had been shot in the abdomen, the bullet passing through the intestines, severing the mesenteric artery and lodging in the hip bone. The wound was mortal and of a nature to cause intense suffering.

The court instructed the jury in the following language: "If, from the evidence you believe that, without any overt act or physical demonstration upon the part of the deceased sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he, the defendant, fired the fatal shot

at the deceased and killed him, such killing under such circumstances was not justifiable."

Complaint is made of this, not as embodying any erroneous proposition of law, but as being foreign to any reasonable theory which might be taken of the evidence. But, by the testimony of Wagner, Farrell was shot and fell ten feet away from the front door in which Lewis was standing. The latter picked up the gun, aimed and fired, saying: "Damn you, I will learn you to fight me." If this evidence was accepted by the jurors, it remained for them to decide whether Farrell's conduct was such as to justify the defendant, under subdivisions 2 and 3 of section 197 of the Penal Code. The instruction was, therefore, pertinent.

Upon the law of self-defense the court instructed the jury as follows: "The defendant is not necessarily justified because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the question is: Would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant will be so justified. If this ¹⁹¹ was defendant's position it was his right to repel the aggression, and fully protect himself from such apparent danger. *If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill, he must fly, or, as the books have it, must retreat to the wall.* But by this is not meant that a party must always fly, or even attempt flight. The circumstances of the attack may be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted, and the necessity of slaying his assailant avoided. If the attack is of such a nature, the weapon of such a character, that to attempt to retreat might increase the danger, the party need retreat no further."

Appellant especially complains of the italicized language. Respondent shows that this is an exact quotation from an instruction approved in *People v. Iams*, 57 Cal. 115; but in *People v. Williams*, 73 Cal. 531, this court in Bank said that while the whole charge of the court in *People v. Iams*, 57 Cal. 115, was approved, but a small part of it was really under consideration, and as to the rest the declaration was obiter, and that while the charge upon the whole was an able resume of the law, portions of the charge, if isolated, would require qualification.

In *People v. Flecker*, 109 Cal. 451, where the right of self-defense is considered at some length, it is pointed out that our law nowhere imposes the duty of retreat upon one who, without fault himself, is exposed to a sudden felonious attack, and that the duty of withdrawal or retreat is imposed upon him alone who is the first aggressor, or has joined in a mutual combat, and it is further said that while at common law there was a contrariety of opinion upon the part of the writers as to the duty of retreat, which contrariety has found its way into the differing decisions of our state courts, this state has upheld a defendant's right to stand his ground ¹⁹² and meet by force a sudden and violent attack. "So that while the killing must be under an absolute necessity, actual or apparent, as a matter of law that necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense."

Wharton, in the eighth edition of his *Criminal Law*, paragraph 486 a, discussing the necessity of retreat, holds retreat to be necessary upon the part of one who has been the aggressor, and, in cases of mutual personal conflict, but concludes: "Nor is retreat required from a party who at the time is standing on his rights." In the tenth edition of his work it is said (section 99): "It has also been said that a party who can fly from an aggressor is bound to fly, and cannot set up self-defense. This, as we will hereafter see, is so far true that an assailed party cannot, unless driven to the wall, take his assailant's life; but, as an elementary proposition, it is not true that if I can evade the attack by flight, then I must fly to evade the attack. If this were the law, few persons in times of trouble would remain at their posts. This, however, by confining the right of self-defense to attacks of which there could be no prior suspicion would virtually abrogate the right, or it would be to say that the right of self-defense only exists when there is nothing to defend, and besides, the fundamental principle is that right is not required to yield to wrong."

Rice on Evidence, section 360, thus sums up the principle: "A very brief examination of the American authorities makes it evident that the doctrine as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee, when

assailed, to avoid chastisement, or even to save human life, and that tendency is well illustrated ¹⁹³ in the recent decisions of our courts bearing on the general subject of the right of self-defense."

It was in *Runyon v. State*, 57 Ind. 80, 26 Am. Rep. 52, where the language above quoted from Rice on Evidence was employed by the supreme court. That case is quoted with approval by the supreme court of the United States in *Beard v. United States*, 158 U. S. 550, and the same eminent authority likewise quotes with approval the language of the supreme court of Ohio in *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733, where the court says: "The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man who is without fault is not obliged to fly from an assailant who, by violence or surprise, maliciously seeks to take his life, or to do him enormous bodily harm."

But whatever diversity of opinion may be found in the books upon the general proposition of the duty of retreat, the right to stand one's ground, when assailed in one's own home or upon one's own premises, was never seriously questioned, even by the common-law writers. Thus in East's *Pleas of the Crown*, page 271, it is said: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger."

Likewise in Foster's *Crown cases*, chapter 3, page 273, it is said: "In case of justifiable self-defense the injured party may repel force with force in defense of his person, habitation, or property against one who manifestly intendeth and endeavoreth with violence or surprise to commit known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of the danger, and, if in a conflict ¹⁹⁴ between them he happeneth to kill, such killing is justifiable."

In Wharton's *American Law of Homicide* (Philadelphia, 1855), at page 233, the author quotes from 1 Hale, 485: "In such a case A, whether he be a householder or a lodger, being in his own house, need not fly as far as he can, as in other cases of *se defendendo*, for he has the protection of his house to excuse him

from flying, as that would be to give up the protection of his house to his adversary by his flight."

1 Russell on Crimes, chapter 3, section 2, enunciates the same rule; while Wharton (Wharton on Criminal Law, 10th ed., sec. 502) thus declares: "When a person is attacked in his own house he need retreat no further. Here he stands at bay and may turn on and kill his assailant, if this be apparently necessary to save his own life. Nor is he bound to escape from his house in order to avoid the assailant. In this sense, and in this sense alone, are we to understand the maxim that every man's house is his castle. An assailed person—so we may paraphrase the maxim—is not bound to retreat out of his house to avoid violence, even though a retreat may be safely made."

The supreme court of this state in *People v. Payne*, 8 Cal. 341, recognized the rule, and without further quotation from authorities it is sufficient to refer to the cases of *Beard v. United States*, 158 U. S. 550; *State v. Cushing*, 14 Wash. 527; 53 Am. St. Rep. 883; *Willis v. State*, 43 Neb. 102; *State v. O'Brien*, 18 Mont. 1, where a multitude of authorities will be found collated.

It follows herefrom that the court erred in giving the instruction under consideration. That injury to the defendant resulted may not be doubted.

We do not note any other points which call for special consideration, but for the foregoing error the judgment and order are reversed and the cause remanded for a new trial.

Temple, J., Beatty, C. J., McFarland, J., Van Fleet, J., and Harrison, J., concurred.

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS AS TO.—An instruction is properly refused which would permit a jury to acquit a person accused of the homicide of his assailant, if they were "reasonably satisfied from the evidence that the defendant, when he shot the deceased, did it believing that unless he did so the deceased would cut him." That the defendant entertained such a belief is not sufficient. The jury must also be convinced that the circumstances were such as to create in the mind of a reasonably prudent man the belief that such a necessity existed: *Askew v. State*, 94 Ala. 4: 38 Am. St. Rep. 83. See, also, *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note; *State v. Hatch*, 57 Kan. 420; 57 Am. St. Rep. 337.

HOMICIDE—DUTY TO RETREAT WHEN ON ONE'S OWN PREMISES.—If, while one is lawfully on his own premises, another advances in a threatening manner and under such circumstances that the former believes, and has reasonable ground to believe, that he is in danger of losing his life or of suffering great bodily harm, he is not obliged to retreat, but may stand his ground and meet any attack made upon him in such a way, and with such force, as, under all the circumstances, he at the moment believes, and has reasonable ground to believe, is necessary to save his own life or to protect himself from

bodily harm: *State v. Cushing*, 14 Wash. 527; 53 Am. St. Rep. 888, and note.

HOMICIDE—DUTY TO RETREAT—WHEN DOES NOT EXIST. The principle applicable to a mutual rencounter or affray with deadly weapons does not apply to a case in which the first escape from threatened assassination by a determined and persevering enemy probably would not secure the ultimate safety of the accused. In such a case, the accused is not required to retreat if he can, but may stand his ground, and will be excused if he kills his assailant: *Phillips v. Commonwealth*, 2 Duvall, 328; 87 Am. Dec. 499, and note; *Erwin v. State*, 29 Ohio St. 186; 23 Am. Rep. 733.

SANTA CRUZ ROCK PAVEMENT COMPANY v. LYONS.

[117 CALIFORNIA, 212.]

CONSTITUTIONAL LAW—MECHANICS' LIENS.—A statute purporting to give a lien to any person who, at the request of the reputed owner of a lot, grades or otherwise improves a street, is unconstitutional. It is not within the power of the legislature to create a lien against the true owner of property by the acts of the reputed owner, there being nothing to estop him from disputing the acts or contract of the reputed owner.

MECHANIC'S LIEN—FAILURE OF OWNER TO OBJECT TO WORK.—A wife is not precluded from contesting the validity of a lien claimed to exist for work done upon her property, at the request of her husband, by the fact that she knew of the work while it was being performed and did not object to it, when there is no statute creating a liability against her under such circumstances.

Allen, McAllister & Frohman and J. B. Carson, for the appellants.

Parker & Eells, for the respondent.

212 HARRISON, J. The plaintiff seeks by this action to enforce a mechanic's lien on certain real property in San Francisco belonging to the defendant, Ellen Lyons, for work done by it in the improvement of the street in front of said property. The defendant, Ellen, is the wife of her codefendant, James M. Lyons, and the land is her ²¹³ separate property. The work done by the plaintiff was performed under a written contract, entered into between it and the defendant James, and, after its completion, the plaintiff filed a claim of lien with the county recorder, which it now seeks to enforce against the property.

Section 1191 of the Code of Civil Procedure provides: "Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas or vaults or cellars or rooms under said sidewalk, or makes any improvements in connection there-

with, has a lien upon such lot for his work done and materials furnished."

Much of the argument herein has been directed to the question whether it appears, from the record, that the defendant James was the "reputed owner" of the land in question, but, in the view taken by us of the foregoing section, it is unnecessary to decide this question.

The owner of real property may, by his acts or conduct, be estopped from questioning the acts of a reputed owner of such property, and may thereby be bound by the acts of such reputed owner; but, in the absence of the elements of an estoppel, he will not be bound by the unauthorized acts of one who is merely reputed to be the owner of the land. He cannot be deprived of his title to the land, nor can a lien be imposed thereon, against his will, by virtue of any agreement or contract on the part of one who is merely reputed to be the owner of such land, unless he has in some way held such person out as the reputed owner, with authority to do the act, or make the agreement by which it is sought to create the lien. It is no more within the constitutional power of the legislature to authorize a reputed owner of a lot or parcel of land to create a lien thereon, against the will of the real owner, than it would be to authorize such reputed owner to transfer the title to said ²¹⁴ land; and we hold, therefore, that so far as the foregoing section of the code purports to authorize the creation of a lien upon land, by virtue of a contract for the improvement of the street adjacent thereto, entered into with one who is only the reputed owner of the land, or to affect the interest of the real owner therein, it is unconstitutional.

There was no evidence before the court that the defendant Ellen gave to her husband any authority to enter into the contract for the improvement of the street; and the finding of the court that he entered into said contract as her ostensible agent, and in her behalf, is not sustained by the evidence.

The plaintiff also offered evidence tending to show that the defendant Ellen knew of the work while it was being performed, and neither made objection thereto nor gave any notice to it that she would not be responsible therefor, and has argued that, by reason thereof, it is entitled to enforce the lien. Section 1192 of the Code of Civil Procedure, however, limits the right of lien in such cases to "every building or other improvement mentioned in section 1183" in the code; and section 1191, which alone provides for a lien upon a lot for the work done in improving the street in front of such lot, contains no provision of this nature.

The judgment and order denying a new trial are reversed.

Temple, J., Henshaw, J., McFarland, J., Van Fleet, J., and Garoutte, J., concurred.

MECHANIC'S LIEN STATUTES—CONSTITUTIONALITY.—A mechanic's lien law enacted for the sole purpose of enabling strangers to the title to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever, is unconstitutional, and leaves the law as it was before its passage: *John Spry Lumber Co. v. Sault Sav. Bank etc. Co.*, 77 Mich. 199; 18 Am. St. Rep. 396. See, also, *Meyer v. Berlandt*, 39 Minn. 438; 12 Am. St. Rep. 663.

MECHANIC'S LIEN—ATTACHES TO WHAT PROPERTY—MARRIED WOMEN.—A mechanic's lien is ordinarily limited to the interest of the person for whom, or at whose instance, the materials were furnished or the labor performed: *Henderson v. Connelly*, 123 Ill. 98; 5 Am. St. Rep. 490, and note. But the property of a married woman has been held subject to mechanic's liens, resulting from contracts entered into by the husband, in cases where the wife, by her participation in the contract, oversight of the work thereunder, or knowledge of its progress, has estopped herself from denying her liability: See *Spears v. Lawrence*, 10 Wash. 368; 45 Am. St. Rep. 789; *Jobe v. Hunter*, 165 Pa. St. 5; 44 Am. St. Rep. 639; *Althen v. Tarbox*, 48 Minn. 18; 31 Am. St. Rep. 616. Compare *Hoffman v. McFadden*, 56 Ark. 217; 35 Am. St. Rep. 101.

McCAUGHEY v. SCHUETTE.

[117 CALIFORNIA, 223.]

IN CODE PLEADING, THE ULTIMATE, and not the probative, facts must be alleged, and a complaint merely stating the evidence from which the ultimate facts are deducible is insufficient when assailed by demurrer.

PLEADING.—IN AN ACTION TO RECOVER POSSESSION OF REAL PROPERTY, a complaint which states that the defendant mortgaged such property to plaintiff, and then agreed to convey it to him in satisfaction of the mortgage debt, that such conveyance was thereupon made, and that the defendants are in possession of the property and have refused, after a demand, to deliver it up to the plaintiff, is fatally defective, because it sets up mere matters of evidence, and does not contain any statement of seisin, or ownership, or right of possession on the part of the plaintiff.

A. McConoughey and E. Parker, for the appellants.

William Humphrey, for the respondent. •

223 THE COURT. After a careful examination of the points involved in this appeal we are satisfied with the opinion and judgment rendered in department. For the reasons given in the Department opinion the judgment and order appealed from are reversed, and the court is directed to sustain the demurrer to plaintiff's complaint, with leave to plaintiff to amend.

The following is the opinion rendered in Department One, October 22, 1896:

SEARLS, C. This is an action to recover possession from the defendants, who are appellants here, of lots A, B, C, J, K, and L, in block 131 of Horton's addition ²²⁴ to San Diego, county of San Diego, state of California.

Plaintiff had judgment, from which judgment and from an order denying their motion for a new trial defendants appeal.

The complaint was demurred to upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. We think the demurrer should have been sustained.

The complaint may be summarized thus: 1. December 22, 1891, defendants made their promissory note to plaintiff for two thousand dollars, and, to secure the payment thereof, executed a mortgage upon the lots of land sought to be recovered in this action; 2. Afterward and on the twenty-second day of March, 1893, plaintiff and defendants entered into an agreement, by the terms of which said defendants agreed to convey to plaintiff, and the latter agreed to take, said real property in full payment of the note and to release defendants from liability thereon, and deliver the same up to defendants and to discharge of record the mortgage; 3. That on the twenty-third day of December, 1893, defendants delivered to plaintiff their grant deed of said premises, and the latter delivered up the note and discharged the mortgage of record. Said deed from defendants to plaintiff, and the note and mortgage, are made part of the complaint; 4. At the date of the delivery of the deed there was two thousand five hundred and one dollars and twenty-eight cents due on the note, and the deed was made in payment thereof; 5. Defendants are in possession of the premises and plaintiff has demanded possession thereof, which said defendants refuse to deliver up, and exclude plaintiff therefrom against his will and right.

Wherefore, he demands judgment for the delivery of possession of said premises, etc.

It is a fundamental rule of our code pleading that ultimate and not probative facts are to be averred in a pleading: *Miles v. McDermott*, 31 Cal. 271.

In *Thomas v. Desmond*, 63 Cal. 426, it was said, in ²²⁵ substance, that where a complaint merely states the evidence from which ultimate facts are deducible, a demurrer lies.

In *Siter v. Jewett*, 33 Cal. 92, it was held that averments in a complaint of the facts constituting a deraignment of title are but averments of evidence, and are not admitted by a failure to

deny them in the answer. *Racouillat v. Rene*, 32 Cal. 450, is to like effect.

In *Gates v. Salmon*, 43 Cal. 361, it was held that an allegation in a complaint that B executed an instrument in writing, purporting to convey to T a tract of land which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as surplusage.

Such evidentiary matters should be stricken out in an action of ejectment: *Willson v. Cleaveland*, 30 Cal. 192. See, also, *San Joaquin v. Budd*, 96 Cal. 47.

It will be observed that in the complaint in the present case there is no averment of seisin, or ownership, or possession, or right of possession, to the demanded premises, but the pleader contents himself with a statement of evidentiary facts, which, if proven at the trial, would authorize the court in finding the ultimate fact of ownership and right to possession in the plaintiff.

In *Fredericks v. Tracy*, 98 Cal. 658, it was said of such a pleading that it was insufficient, and that a complaint which stated only facts from which the ultimate fact might be deduced was subject to a demurrer.

In *Los Angeles v. Signoret*, 50 Cal. 298, the action was to enforce a lien for the construction of a sewer. The complaint referred to an exhibit, attached to and made a part thereof, for particulars, which exhibit recited the various steps necessary to create the lien; but, on demurrer, the pleading was held insufficient.

The complaint here is argumentative—that is to say, the affirmative existence of the ultimate fact is left to inference or argument.

Such pleading was bad at common law, and is none the less so under our code system.

To uphold such a pleading is to encourage prolixity ²²⁶ and a wide departure from that definiteness, certainty, and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect, except to encumber the record with verbiage and enhance the cost of litigation.

We recommend that the judgment and order appealed from be reversed, and that the court below be directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the court below di-

rected to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

Harrison, J., Garoutte, J., Van Fleet, J.

PLEADING—CODE SYSTEM—FACTS, NOT EVIDENCE, MUST BE ALLEGED.—Under the code system of pleading, facts only must be stated. This means the facts as contradistinguished from the law, from hypothesis, and from the evidence of the facts: *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492; *Gray v. Osborne*, 24 Tex. 157; 76 Am. Dec. 99. It is the ultimate, and not the probative, facts which should be averred: Note to *Green v. Palmer*, 76 Am. Dec. 498. So an allegation of duty, without stating the facts which raise the duty, is insufficient, and, if the facts stated do not raise the duty alleged, the allegation of duty is immaterial: *Hewison v. New Haven*, 84 Conn. 136; 91 Am. Dec. 718. See, also, *Morrison v. Insurance Co.*, 69 Tex. 353; 5 Am. St. Rep. 63.

IN RE KAUFMAN.

[117 CALIFORNIA, 283.]

WILLS.—THE UNDUE INFLUENCE which will invalidate a will must be such as operates upon the mind of a testator at the time of making the will, and must be an influence relating to the will itself.

WILLS, UNDUE INFLUENCE, EVIDENCE SUFFICIENT TO PROVE.—Unless there is evidence tending to prove some fraud practiced upon the testator, or that some physical or moral coercion was employed such as to destroy his free agency, the court should not submit to the jury the question whether undue influence had been used.

WILLS, UNJUST OR CAPRICIOUS.—If a person has testamentary capacity, his will cannot be avoided on the ground that it is unjust or capricious.

WILLS—STATEMENTS OF TESTATOR, WHEN NOT COMPETENT TO IMPEACH.—Statements made by a testator after its execution to the effect that he did not make the will and did not know what was in it, that he wanted to give a particular heir as much as the others, and did not feel safe if he made another will, are not admissible to impeach his will.

WILLS—EVIDENCE OF FINANCIAL STANDING OF HEIRS.—In a contest of a will by which one of the heirs of a testator was disinherited, it is not proper to admit evidence of the wealth of the heirs who are preferred by the decedent as compared with the wealth of the heir omitted from the will.

WILLS—ADMISSION OF IMPROPER EVIDENCE ON CONTEST OF.—When the validity of a will is contested on the ground of undue influence, the court cannot be too careful in excluding from the consideration of the jury incompetent and irrelevant evidence. Such evidence, if once admitted, may produce an effect which cannot be effaced by subsequent instructions.

Shepherd & Eastin, and H. L. Poplin, for the appellant.

Barnes & Selby, and Orestes Orr, for the respondent.

²⁹⁰ HARRISON, J. Upon the contest of the probate of the last will and testament of Mary Kaufman, deceased, filed by the respondent herein, a jury was called to try the issues presented thereby, and, at the conclusion of ²⁹¹ the testimony, the contestant conceded that all the issues raised by her contest, except those of undue influence and fraud, should be determined in favor of the proponent, and thereupon withdrew all the issues except these, and the following special issues of fact were submitted to the jury: "1. Was the instrument now offered for probate as the last will of Mary Kaufman, deceased, procured by the undue influence of Mary Borchard, John E. Borchard, Frances Petit, Justin Petit, and John Pujol, or any of them? 2. Was the instrument now offered for probate as the last will of Mary Kaufman, deceased, procured by the fraud of Mary Borchard, John E. Borchard, Frances Petit, and Justin Petit, or any of them?"

The jury answered each of these questions in the affirmative, and thereupon the court made an order denying probate to the will. A motion for a new trial was made and denied, and, from the order refusing probate to the will, and also from the order denying a new trial, the proponent has appealed.

Mrs. Kaufman executed the will in question January 8, 1895, and died on the 11th of the succeeding May. Prior to its execution she had determined to submit to an operation for cancer, which, she was informed, might result unfavorably, and thereupon sent for Father Pujol, her priest, who suggested to her the propriety of making her will. Upon this suggestion, she sent for Mr. Borchard, the husband of one of her daughters, and, at his request, Mr. Shepherd, an attorney, came to her house, and prepared the will in accordance with directions which he received from her, and it was thereupon formally executed in his presence. By the will she gave the bulk of her property to her four elder daughters, and left to the contestant only a nominal legacy. A careful examination of the record, however, fails to show that this disposition of her property was by reason of the influence or suggestion of any person, or that there was any evidence showing that ²⁹² the will was the result of undue influence or fraud in any respect.

Father Pujol testified that he went to visit her for the purpose of administering to her, and, being there, suggested to her that the operation was dangerous, and inquired whether she had made her will; and, upon her telling him that she had not, suggested that it would be better to make one; that, if she should, it would have no force until after her death, and that, if at any time she

was dissatisfied with it, she could make a new one. He also testified that nothing was said between them about the disposition of her property. "We did not say anything of the kind; the only thing that was said was this concerning Lizzie, that she was not willing to leave her anything whatsoever, and I said: 'It will not do, Mrs. Kaufman; you must leave her something. It is true, that she has been a very wayward child, and that she does not deserve the name of being your daughter on account of the way she has treated you; but, notwithstanding that, it will be necessary; you will have to leave her something. I did not tell her how much it would be necessary to leave her. I left that to her; but I said: 'You must leave her something.' I told her that it was necessary to leave her something to avoid the law, because, I said, 'If you don't leave her anything, your will will be thrown away, and the law demands that you will leave her something.' I did not mention any small amount necessary to put in the will. I said any amount would do to avoid the law, but not saying any amount. I said first five dollars or two dollars or one dollar will do; but, that I said to leave her that much, that I did not." This interview with Father Pujol was on the 4th of January, and on that day, after he had left, Mrs. Kaufman sent for the proponent through Mrs. Petit, another of her daughters, and, on his arrival, spoke to him about making her will, and said she wished to give her property to four of her heirs, naming them, and asked him what he thought of it. "I asked her what about the other heirs—Mrs. ²⁰³ King and her grandson. Just then she didn't have much to say; but, at any rate, I named them all, and, when I came to Lizzie—Mrs. King—she objected right away. I told her she ought to divide her property into five and a half parts, under the condition, under the circumstances of the past. I thought that the grandson was entitled to one-half of a fifth, and that she should divide the rest into five parts. She said Lizzie should not have anything, and her grandson should have no land; but she might give him some money." She determined to make deeds of her real estate to her four daughters; and, after considerable talk upon the mode of division, she finally told Mr. Borchard how she wished it divided, and to tell the attorney to fix it up that way. Borchard further testified: "This talk was about the deeds, and who should have this or that piece. With the will I really had nothing to do. I didn't know what was in the will until it was opened. . . . When the will was made I wasn't in the room, nor did I know what was in it until it was opened here by the clerk of the court." Borchard had two or three conversations with her prior to the making of the will, and

at some time in the interim he, in company with Mrs. Petit, visited the attorney, Mr. Shepherd, and informed him of the mode in which the real estate was to be divided, and on the 8th of January Shepherd went to the house of Mrs. Kaufman with deeds in which the descriptions were written out, but without the names of any of the grantees, and while at her house wrote in the names of the daughters, as Mrs. Kaufman directed him, for their respective pieces. This was in the forenoon of that day, and, after Mrs. Kaufman had executed the deeds, he took them to his office to authenticate them by his notarial certificate, and in the afternoon returned to her house and wrote the will in accordance with her directions. Mr. Petit testified that he had nothing to do with the making of the will, had no talk with Mrs. Kaufman as to how she should dispose of her property, and did not know how ²⁹⁴ the will was made until it was opened after her death. Mrs. Petit was present at the interview between Mrs. Kaufman and Father Pujol; and corroborates his testimony, but it is not shown that she ever had any conversation with her mother, or said anything to her about making her will or disposing of her property. Mrs. Borchard testified that she had no talk whatever with her mother about dividing the property. "I did not know how she was going to dispose of it from any source; I had no knowledge of how she was going to dispose of her real estate, except what I had heard from Mr. Borchard. I had no talk whatever before the will was made in regard to how the property should be disposed of; mother never mentioned to me; I did not know what was in the will." These witnesses, with the exception of Father Pujol, were called by the contestant, and were the only witnesses who gave any testimony relative to the circumstances attending the execution of the will, and the testimony above given was neither contradicted nor impeached; and, as it fails to show that the will was executed under an undue influence or fraud, we must hold that it fails to sustain the verdict of the jury.

In April, 1890, the contestant was living with her mother, and was then unmarried. The farm upon which they were living had been rented in the previous November, for the term of one year, to a man named King, who after the lease was made lived at the house with them. It was rumored that Lizzie and King intended to marry each other, and the mother was greatly opposed to this marriage. A serious quarrel took place between them one evening, in which a personal assault was made upon the mother, and the next day, apparently by an agreement of all parties, she left

the house and went to live with Mrs. Borchard. The day after she left, Lizzie and King were married, and continued to occupy the farm until the expiration of the lease, the following December, when they left that vicinity, and Lizzie never afterward saw or communicated with ²⁹⁵ her mother. After they had gone Mrs. Kaufman returned to her place and continued to live there until her death. The greater part of the record is taken up with the circumstances of this quarrel between Lizzie and her mother, apparently either for the purpose of showing to the jury that the mother had no sufficient reason therein for disinheriting her daughter, or in order to allow the jury to conjecture that the mother's dislike of Lizzie may have been fostered by her other sisters. Whatever may have been the reason for its introduction, it was immaterial and irrelevant to either of the issues submitted to the jury.

The undue influence which will avoid a will must be such as operates upon the mind of the testator at the time of making the will, and must be an influence relating to the will itself: 1 Redfield on Wills, *534; Schouler on Wills, sec. 232; Eckert v. Flowry, 43 Pa. St. 46. Upon this proposition the court said in the case last cited: "Unless there was some evidence tending legitimately to prove that some fraud had been practiced upon the testatrix at that time, or that some misrepresentation had then been made, or that some physical or moral coercion had been employed, such as to destroy her free agency, the court erred in submitting to the jury the question whether undue influence had been exerted. It was inviting them to find as a fact that of which there was no evidence, and which the law as well as reason presumed had no existence." If the person has testamentary capacity, his will cannot be avoided on the ground that it is unjust or capricious. The right of absolute dominion over his property is sacred and inviolable, and whatever may be his motives, or however great or unfounded his dislikes or his resentments against those who might be thought worthy of his bounty, his will in the disposition of his property is paramount: 1 Redfield on Wills, *525; Woodward v. James, 3 Strob. 552; 51 Am. Dec. 649; Clapp v. Fullerton, 34 N. Y. 190; 90 Am. Dec. 681; Estate of McDevitt, 95 Cal. 17. "The right of a testator to dispose ²⁹⁶ of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own, and, if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust": Clapp

v. Fullerton, 34 N. Y. 190; 90 Am. Dec. 681. "The right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion or because it does not conform to their ideas of what was just and proper": Estate of McDevitt, 95 Cal. 17.

Testimony was given by one witness that in a conversation with Mrs. Kaufman about three weeks before her death she said to him that she did not make a will and did not know what was in the will; that she was sorry Lizzie was not in the will, and that she wanted to give Lizzie the same as the others, and that she did not feel safe if she should make another will. This statement, made by her several months after the execution of the will, was not competent to impeach its validity, and the jury should not have been permitted to consider it: Estate of Calkins, 112 Cal. 296.

The court permitted the contestant, against the objections of the proponent, to give evidence of the amount of property owned respectively by the husbands of the beneficiaries under the will, and also that the contestant and her husband were comparatively without any property. The evident object of this evidence was to give to the jury the impression that the contestant had been unjustly treated in the division of her mother's estate, and it should have been excluded by the court. Aside from the fact that Mrs. Kaufman had the right to exclude the contestant from the will if she so desired, the testimony was neither relevant nor competent for the purpose of sustaining either of the issues before the ²⁹⁷ jury, and its introduction could have only a prejudicial effect upon their minds. When the validity of a will is contested upon the ground of undue influence in its execution, a court cannot be too careful in excluding from the consideration of the jury evidence that is incompetent or irrelevant to establish the charge. The very nature of the issue, as well as the lack of experience and of mental training on the part of the jurors in reference thereto, render them less able than the court to weigh the sufficiency of any evidence that may be offered upon this issue. The fact that the evidence has been permitted by the court to come before them justly authorizes them to consider that it is both relevant and competent for that purpose, and the evidence so received will, unconsciously it may be, produce an impression

upon their minds which will not be effaced by subsequent instructions.

A motion is made to dismiss the appeal from the judgment denying probate to the will upon the ground that it was not taken until more than sixty days after its entry. This motion must be granted, although the reversal of the order denying a new trial will have the effect to set aside the judgment denying probate to the will.

The appeal from the judgment is dismissed. The order denying a new trial is reversed and a new trial ordered.

Van Fleet, J., and Garoutte, J., concurred.

Hearing in Bank denied.

WILLS—UNDUE INFLUENCE—WHAT SUFFICIENT TO INVALIDATE.—Undue influence to invalidate a will must be such as to control the mental operations of the testator and amount to a substitution of the will of the dominant over the weaker mind: *Fry v. Jones*, 95 Ky. 148; 44 Am. St. Rep. 206. It must be exercised to such an extent that its effect is to destroy the free agency of the testator, and to control the disposition of his property under the will: *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665, and monographic note.

WILLS—UNJUST DISCRIMINATION.—A testator, having sufficient mental capacity, may make an unreasonable, unjust, and infiducious will; and a jury has no right to alter the disposition made of his property merely because justice is not done to his family connections: *Berberet v. Berberet*, 131 Mo. 399; 52 Am. St. Rep. 634, and note; *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33, and note.

WILLS—UNDUE INFLUENCE—EVIDENCE—DECLARATIONS OF TESTATOR.—Parol declarations of a testator made before or after the execution of a will cannot be admitted in evidence for the purpose of invalidating it: *Robinson v. Brewster*, 140 Ill. 649; 33 Am. St. Rep. 265. Such declarations not made in connection with the execution of the will are not admissible for the purpose of showing that the will was procured by undue influence: *Goodbar v. Lidikey*, 136 Ind. 1; 43 Am. St. Rep. 296, and note. The evidence of undue influence must be other than that which proceeds from the testator's own mouth after the will was executed: *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665, and monographic note, 690.

WILLS—CONTESTS OF—EVIDENCE.—Upon the general subject of extrinsic evidence admissible to explain wills, see monographic note to *Chappell v. Missionary Soc. etc.*, 50 Am. St. Rep. 279-294.

PRESCOTT v. EDWARDS.

[117 CALIFORNIA, 298.]

APPEAL, IMMATERIAL ERROR.—Though a complaint contains matters which do not aid plaintiff, and which are therefore superfluous, any error of the court in overruling a demurrer pointed at these matters is immaterial.

DEDICATION, OFFER OF CAN BE REVOKED.—If a landowner offers to dedicate certain lands as public streets or highways, but they are never used as such and the dedication is never accepted, he may withdraw his offer.

DEDICATION OF LANDS TO PUBLIC USE.—The public must be a party to every dedication. Therefore the platting of lands, recording the plat, and selling lots by reference to it do not constitute a dedication if the public does not accept it, and prior to such acceptance the offer of dedication may be withdrawn.

STREETS, ESTOPPEL OF VENDOR TO DENY DEDICATION OF.—One who goes upon land with a surveyor, and, by stakes marking boundary lines, divides it into small parcels, between which he leaves strips, and to persons contemplating purchasing states that such strips are streets, and who afterward sells and conveys such parcels, not including the streets, is estopped from denying as against his grantees and their successors in interest that the lands included in such strips are streets.

Charles W. Thomas, for the appellant.

Philip Bruton, for the respondent.

³⁰⁰ GAROUTTE, J. Upon the face of the complaint the cause of action and relief sought are not made perfectly clear. The trial court held the action to be one to enforce a right of way by plaintiff as appurtenant to his land over and across certain parcels of defendant's land; and respondent's counsel agrees with the trial court as to the nature of the cause of action. Treating the action as of the character denominated, we shall consider the merits of the litigation, judgment having gone for plaintiff and defendant appealing. Viewing the action from the standpoint of the trial court, there are matters alleged in the complaint which give it no strength and may be termed surplusage; but it cannot be said that ³⁰¹ the court committed any material error in overruling defendant's demurrer pointed at these matters.

There are some allegations of the complaint declaring that the defendant dedicated these parcels of land to the public as highways; and as to the fact of dedication, the trial court found that defendant offered to dedicate them to the public as streets and abandoned them as such to the public, but that the public never accepted such offer of dedication. The court further found that such parcels of land had never been used by the public as highways. Conceding, for the purposes of the case only, that the evi-

dence at the trial was sufficient to support a finding of fact to the effect that an offer of dedication to the public was made, still many years had intervened since that offer was made, and it had not been accepted by the public, either expressly, impliedly, or presumptively. Under such circumstances, the owner beyond question had a right to revoke it, and that right he exercised by placing obstructions upon the land, of which acts complaint is now made. This revocation eliminates the whole question of dedication and offer of dedication and abandonment to the public from the case, and plaintiff's right must rest upon other principles. The finding of fact that defendant abandoned these lands to the public as streets is a purely evidentiary matter tending to show dedication, and adds no strength in support of the judgment. In saying that there is no question of dedication in the case, the term "dedication" is used in its strictly legal sense. In that sense dedication is a matter purely between the owner and the public. There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. Some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitutes a dedication of the streets in favor of the purchasers of these lots, even though a dedication to the public is not perfected and completed. The statement is not correct as a legal principle, as may be seen from what has already been said.

³⁰² Has the plaintiff a right of way over and upon the lands described? The court found that both the plaintiff and his predecessors in title did purchase an interest in said strips of land, which interest was an easement of a right of way as appurtenant to the lands now owned by plaintiff. The facts in support of this conclusion may be briefly stated; and the facts we state are largely those drawn from the evidence of plaintiff's witnesses. Wherever contradictions appear in the evidence, that evidence which tends to support the judgment is adopted. Defendant, as the owner of a certain tract of open land near the town of Winters, went upon the ground with his surveyor, and by stakes marking boundary lines divided the tract into small parcels. Between these parcels he left two strips of land, respectively sixty by four hundred feet. No plat or map of these lands was made at the time, but defendant accompanied by parties contemplating purchasing went upon the ground and there viewed the conditions, as delineated by the stakes. In selling to plaintiff's predecessors the defendant sold by metes and bounds, at the time of the sale informing the purchasers that the strips marked upon the ground by

stakes were streets. The tracts sold adjoined these strips. Thereafter the purchasers entered upon the lands bought, and improved the same by fences and otherwise. The trial court found as a fact that plaintiff's predecessors would not have purchased these tracts if the representations had not been made by defendant that these strips of land were streets.

In principle there can be no difference as to any question of streets in the legal status of a purchaser who buys a lot according to a plat made by the owner whereon streets are delineated, and a purchaser who buys as plaintiff's predecessors bought. This land was platted upon the ground. The plat was as perfect as if pictured upon paper, and probably more satisfactory. To be sure, the blocks were not numbered and the streets were not named, as would probably have been the fact if the plat had been transferred to paper. ³⁰³ But we do not see that either numbers or names are essential. Again: By the deeds the lands were described by metes and bounds, and no reference is found therein to any street, but at the time of sale the defendant pointed out these strips of land as streets, and the land sold bordered on such strips. The purchaser's condition was thus the same as if the land had been sold by a recorded or unrecorded plat. Under the circumstances we have depicted it would be a gross injustice for the owner to deprive a purchaser of the privilege of using such strips of land as streets, and an injustice which the law does not countenance. While the case in its facts is out of the ordinary, upon principle it is analogous, as we have shown, to all those cases where plats have been used in the making of sales; and we know of no case of that kind where relief has been refused when sought in courts of justice. While courts may not all have agreed upon the legal principle to be invoked in administering relief, yet the result has always been the same—relief has always been granted.

Dedication is but a phase of estoppel. In speaking of dedication of land to public use, Herman, in his work on Estoppel, section 1141, says: "It does not operate as a grant, but is in the nature of an estoppel in pais, which debars the owner from recovering it back." And the decisions of this court, where it is declared that as to the purchaser of lots adjoining platted streets such streets are dedicated by the owner, mistake the true doctrine in form rather than in substance, for it is the doctrine of estoppel in pais that gives the vendee his remedy, and prevents the practice of injustice by the vendor. In *Grogan v. Hayward*, 6 Saw. 498, 4 Fed. Rep. 161, Justice Field, in speaking as to the respective rights of the public and a purchaser by a plat, said:

"In the one case the acceptance completes the transfer of the property or easement in it from the owner to the public; in the other case the contract with the owner estops him from asserting any interest except in common with the purchasers from him." Again: ³⁰⁴ "The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the land, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but as appurtenant to it an easement in the streets and in the public grounds named, with an ample covenant that subsequent purchasers should be entitled to the same rights." This principle is reiterated in *People v. Reed*, 81 Cal. 78; 15 Am. St. Rep. 22. In *Schmitt v. San Francisco*, 100 Cal. 303, this court said: "In other words, if the dedication has not been accepted or the property used by the public, it is purely a question of estoppel in pais. If no one has acted upon the offer in such a mode that they would be injured by the revocation, the owner may revoke the dedication, even though it be an actual dedication and not a mere offer." It is plain that the word "dedication," as here used, only implies the doing of all those acts by the owner which leaves nothing to be done to perfect a complete and perfect dedication save an acceptance of some kind upon the part of the public.

In the present case, these strips were outlined upon the ground, and at the date of the purchase were declared by the owner to be streets. The right to use them as such formed part of the consideration moving to the vendee for the purchase, and such right of use became appurtenant to the land granted. The owner declared to the purchasers that the parcels were streets; the purchasers acted upon such declaration; and as to such purchasers those parcels are streets.

For the foregoing reasons the judgment and order are affirmed.

Van Fleet, J., and Harrison, J., concurred.

Hearing in Bank denied.

APPEAL—IMMATERIAL ERROR.—When the court can clearly see affirmatively that error has worked no harm to the party appealing, it will be disregarded: *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 850, and note. Where a complaint contains irrelevant and redundant averments, they should be stricken out on motion, but the refusal to strike them out is not reversible error, unless it affirmatively appears that prejudice results thereby to defendant:

Columbus etc. Ry. Co. v. Bridges, 86 Ala. 448; 11 Am. St. Rep. 58, and note.

DEDICATION—OFFER OF CAN BE REVOKED.—A dedication of land to public use as a highway must be accepted and appropriated to the uses intended, and, until there is such acceptance, the owner may withdraw his offer and appropriate the land to any other purpose he may choose: Monographic note to Whitesides v. Green, 57 Am. St. Rep. 753. See note to Mason v. Sioux Falls, 39 Am. St. Rep. 811.

DEDICATION BY MARKING ON TOWN PLAT.—The mere marking out of a village plat does not necessarily make the space a public way, unless the public authorities accept it as such: Monographic note to Whitesides v. Green, 57 Am. St. Rep. 753. As to the rights of purchasers under such plat, see Field v. Barling, 149 Ill. 556; 41 Am. St. Rep. 811.

HIGHWAY—ESTOPPEL TO DENY LOCATION.—A person will not be heard to dispute the location of a highway, which location he has distinctly admitted by his declarations and acts: Whitesides v. Green, 13 Utah, 841; 57 Am. St. Rep. 740; People v. Reed, 81 Cal. 70; 15 Am. St. Rep. 22. See, also, In re Brooklyn, 118 Pa. St. 640; 4 Am. St. Rep. 618.

IN RE LIGGET.

[117 CALIFORNIA, 352.]

HOMESTEAD, CLAIMING TWO DWELLINGS.—If a declaration of homestead is filed on property containing two dwellings, one occupied by the claimant and the other rented to a tenant, the latter cannot be held as part of the homestead.

INSOLVENCY PROCEEDINGS—SETTING APART HOMESTEAD.—On an application of an insolvent debtor to have property set aside as a homestead, the court is not precluded by the fact that there is no written opposition to the application from inquiring whether the whole of the property is exempt as a homestead and refusing to set aside such part as is rented out to a tenant and has never been used as a home.

R. Clark and F. E. Baker, for the appellant.

Hurst & Hurst and L. T. Hatfield, for the respondents.

352 HAYNES, C. B. F. Ligget, having been adjudged an insolvent debtor upon the petition of his creditors, filed a petition in the superior court asking to have set apart as a homestead lots 1, 2, 3, 4, 9, and 10 of block 2, range D, of the town of Davisville, in Yolo county. The assignee appeared and contested the petition as to a portion of the property sought to be set apart.

Findings were filed by the court, from which it appears that, prior to the proceedings in insolvency, the wife of petitioner caused a declaration of homestead to be filed upon all of said property; that at the time of making and filing said declaration of homestead, and at the time of the hearing of said petition, the said

petitioner, with his wife and family, resided on lot 3, upon ²⁵³ which their dwelling-house was situated; that all of lots Nos. 2, 3, 4, 9, and 10, and a strip across the rear end of lot No. 1 of twenty feet, more or less, were used in connection with and as a part of said homestead, but that no part of said lot No. 1, except the said strip, was ever used in connection with or as a part of said homestead; that at the time of the said making and filing of the said declaration of homestead there was, and now is, upon the front part of said lot 1 a dwelling-house and appurtenances thereto, and that said lot 1, except said strip across the rear end thereof, is separated from the remainder of said premises by a fence, and had been rented by said petitioner at a monthly rental of about eight dollars, but had not been rented since the filing of said homestead declaration, and that petitioner had never used said portion of said lot 1 except to rent it. The court further found that said lot 1 is suitable for a homestead, as is also the remainder of the said premises, including the said strip off the rear end of said lot 1.

The court thereupon made an order setting apart to the petitioner all of said property except that portion of lot 1 which was inclosed with the dwelling upon it, and which had been theretofore occupied by a tenant, and the petitioner appeals from so much of said order as refused to set apart to him as a homestead the whole of lot 1 with the other property.

Appellant seems to rely upon the fact that his wife included the whole of the property in her declaration of homestead, and that therefore the homestead so declared upon must be set apart under the statute. In this the appellant is mistaken. Section 1237 of the Civil Code provides: "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated selected as in this title provided."

In *Lubbock v. McMann*, 82 Cal. 226, 229, 16 Am. St. Rep. 108, a declaration of homestead had been filed upon a lot upon which there was but one dwelling-house, and afterward a second dwelling was erected upon a portion ²⁵⁴ of the same lot. It was held that the homestead covered and included both dwellings, the court holding that the erection of the additional dwelling did not vitiate or affect the homestead as an entirety; that a homestead once duly established cannot be defeated nor vitiated except by conveyance, encumbrance, or abandonment in the manner provided by sections 1242 and 1243 of the Civil Code. But the court said that "if, at the time of filing the declaration for record, the two houses now standing upon his lot had been standing as they now

do, and occupied as they now are, only the one occupied as the dwelling of the plaintiff, with that portion of the lot used in connection therewith, would have been impressed with the homestead character; as to the other house and the land used in connection with it, the attempt to dedicate it as a homestead would have been inoperative: *Tiernan v. His Creditors*, 62 Cal. 286; *Maloney v. Hefer*, 75 Cal. 424; 7 Am. St. Rep. 180; *In re Allen*, 78 Cal. 294."

It is clear, therefore, that the filing of the declaration of homestead by Mrs. Ligget did not operate to include the dwelling on lot 1, and that portion of the lot inclosed therewith, in the homestead, nor does the code permit the court to include it with the other lots, upon which the petitioner resides, in the homestead set apart by the court; nor are the findings that lot 1 with the dwelling thereon was suitable for a homestead, and that the portion set apart was also suitable as a homestead, inconsistent.

Appellant further contends that no written opposition to his petition was filed, that therefore no issue was made, and the court should have set aside the whole of the property petitioned for.

Under the Insolvent Act of 1895 it is made the duty of the court to set apart a homestead for the benefit of the insolvent "in the manner provided in section 1465 of the Code of Civil Procedure." That section authorized the court on its own motion, or on petition therefor, to set apart a homestead for the use of the surviving ³⁵⁵ husband or wife, etc; but the homestead set apart under that provision of the Code of Civil Procedure could not exceed the homestead provided for in section 1237 of the Civil Code. It might be set apart by the court on its own motion or upon the petition of the insolvent. Neither the Insolvent Act nor the Code of Civil Procedure provided for any written opposition, and whether anyone opposed the application or not it was the duty of the court to ascertain the facts in relation to the character and occupation of the property, and the court was not authorized to set apart any property which under the law did not constitute a part of the homestead occupied by the petitioner simply because the application was not opposed.

It is further said by appellant that there can be no findings where no issues are tendered, and that findings are useless unless they are within the issues. The assignee, however, appeared and opposed the granting of the petition so far as it included lot 1 and the dwelling thereon, so that there was in fact an issue to be passed upon, and the findings recite that the court, at the request of the petitioner prepared and filed findings of fact and conclu-

sions of law. Whether necessary or not, the making and filing of findings could not prejudice the petitioner; nor could he complain of any action of the court of that character taken at his request. No other questions are presented.

The order and decree of the court appealed from should be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the order and decree of the court appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

HOMESTEAD—CLAIMING TWO DWELLINGS.—Homestead can be claimed in that portion of premises only which is occupied as a family residence, where there were a front and rear house on a lot of land, separated by a fence and independent of each other, and the claimants resided in the rear house, and rented the front house to tenants; *Maloney v. Hefer*, 75 Cal. 422; 7 Am. St. Rep. 180. See, also, *Lubbock v. McMann*, 82 Cal. 226; 16 Am. St. Rep. 108, and note; *Ashton v. Ingle*, 20 Kan. 670; 27 Am. Rep. 197.

ROBINSON v. TEMPLAR LODGE

[117 CALIFORNIA, 870.]

BENEFICIAL ASSOCIATIONS—AMENDMENT OF CONSTITUTION AND BY-LAWS.—If, at the time one becomes a member of an order, its constitution and by-laws expressly reserve the right to make amendments thereto, he is bound by a subsequent amendment injuriously affecting him.

BENEFICIAL ASSOCIATIONS — OBLIGATIONS ATTEMPTING TO CHANGE CHARACTER OF.—A declaration in the constitution and by-laws of a beneficial association that its obligations to its members are not contractual, but moral only, and that they do not constitute obligations enforceable by action, cannot change the real character of such obligations. Whether they are contractual or not must be determined from their nature, and not merely by the name given them nor even by the express declaration that they are different from what they, by their terms, appear to be.

BENEFICIAL ASSOCIATIONS—SICK BENEFITS. DENIAL OF, WHEN CONCLUSIVE.—If, by the constitution and by-laws of an association, a member is entitled to sick benefits, but is required to submit his claim therefor to the association, and, if aggrieved by its action, to appeal to its grand lodge, whose decision is declared to be final, any member claiming the right to such benefits must pursue his claim therefor in the lodge or grand lodge, and, failing to do so, cannot resort to the courts with success.

BENEFICIAL ASSOCIATION.—A REGULATION that benefits shall be applied for within five weeks after the right thereto accrues is not unreasonable, and must therefore be sustained.

George D. Collins, for the appellant.

Davis Louderback, for the respondent.

³⁷¹ TEMPLE, J. Appeal from the judgment. The action was brought to recover eight hundred dollars for sick benefits. The complaint charges that defendant, by a contract in writing agreed to pay plaintiff four dollars per week in case he became incapable of earning a livelihood through sickness; that he was so incapacitated during the month of April, 1889, and has so remained ever since; that no part of the said sum of four dollars per week has been paid.

³⁷² Defendant, in its answer, denies the contract, and also that plaintiff was sick or incapacitated to earn a livelihood. Defendant also avers, in effect, that it is a subordinate lodge of the Independent Order of Odd Fellows, which is an organization having a constitution and by-laws, as well as rules, and other regulations; that its members are subject to, and controlled by, such constitution and regulations, and enactments, resolutions, orders, decrees, and decisions made in pursuance thereof. Further, that plaintiff is a member of said order, and his alleged claim arises out of his said membership. The answer then charges, in substance, that plaintiff has not submitted his claim to the order for its action, as the constitution and other regulations of the order require. The contention is, that under the constitution of the order, it is merely a charitable institution, organized for the mutual protection of its members, and, although the rules governing its charities are prescribed, still it is expressly stipulated that they do not create contract obligations, and all rights are made dependent upon the voluntary action of the order itself. Therefore, one can never have an enforceable claim against the order for the so-called beneficence until after it has been awarded by the order in the mode prescribed.

Section 6 of article 4, upon this subject, reads as follows: "This constitution and all laws, rules, and regulations providing for the granting of sick, funeral, and other benefits, or of any aid, relief, assistance, allowance, expenses, or money to any member, wife, widow, orphan, or any person whatever, or providing for the payment to the lodge of dues, assessments, and demands by a member, are not intended and shall not be construed to create the relation of debtor and creditor, nor to create legal rights, liabilities, nor responsibilities, nor any legal contractual relation, nor confer any right to enforce the granting or payment of the same by resort to courts of law; on the contrary, all questions, whether of law or fact, relative to the granting, ³⁷³ payment, or refusal of the same, relate to moral duties or obligations, and not to legal ones, and appertain to the sole jurisdiction of this lodge and

the authorities of this order, and their decisions in the premises shall be binding, conclusive, and final upon all members, wives, widows, orphans, or persons. Every person, by becoming or continuing a member of this lodge, consents to and agrees to abide by all the laws and decisions of this lodge, and of the authorities of the order."

This section was amended so as to read as above in May, 1889. Prior to that amendment it was provided, in effect, that the provisions for benefits were not intended to, and did not, confer upon any one the right to enforce the same in a court of law, but, on the contrary, all questions in regard to the same were for the authorities of the order only, and their decision should be final.

The right to make amendments was expressly reserved to the order, and we must presume that they were made in pursuance of the power given. The constitution and by-laws are in the nature of a contract as between the members, and the plaintiff, having stipulated that such amendment may be made, cannot complain, although it may injuriously affect him. The alleged dues accrued, if at all, after the amendment: *Stohr v. San Francisco etc. Soc.*, 82 Cal. 557.

Section 7, article 4, provides that the constitution, laws, and decisions of the sovereign grand lodge, of the grand lodge, and of this subordinate lodge are the laws of the lodge, and all persons, by becoming or continuing members, "consent to agree to and abide by the same."

I do not doubt that the obligation resting upon the lodge is a contractual obligation, and that the constitution, laws, and other regulations of the order constitute a contract. It is difficult to see how it can be called a mere moral obligation, notwithstanding the language ³⁷⁴ of the constitution. The consideration is fixed, and the agreement to pay the benefit is unequivocal. The member, being in good standing and not delinquent, if, through sickness he is incapacitated for work, is entitled to four dollars per week. The provision is not that he may apply and the lodge may at its option allow a benefit. The lodge contracts that it will allow it. The stipulation, then, is that the member will submit his claim to the lodge, which, by its appointed tribunals, will consider and act upon the same, that the member feeling aggrieved may appeal to the grand lodge, and to the sovereign grand lodge, and the conclusion reached in the order through the proceeding thus inaugurated shall be final and conclusive.

It is contended that these provisions of the order are invalid, because, if valid, they would oust the courts of the state of their

jurisdiction. Upon this proposition many authorities are cited, which, however, I do not deem it necessary to review. A great variety of views has been expressed upon the subject. The question is no longer an open one in this state. It was ruled adversely to appellant in *Levy v. Magnolia Lodge*, 110 Cal. 297.

That case did not involve the question as to sick benefits, but as to the conclusiveness of a proceeding for the expulsion of a member. The principle involved was the same, or, if there be a difference, it is that there would be more question as to the reasonableness of the rule when applied to the expulsion of a member, than when applied to the claim for sick benefits. In that case, it is said that the right of appeal is provided, and the stipulation is to the effect that the decision reached in the proceeding shall be conclusive. As there said, the member, by becoming or continuing to be a member, did all he could to waive his right to resort to a court of law, and it is held that he could waive the right.

It cannot properly be said that thereby the parties oust the courts of their jurisdiction. I presume no one ²⁷⁵ ever supposed that the contract could have that effect, or that the parties so intended. The courts still have jurisdiction to entertain the suit, and any rule or law which would impose a forfeiture upon a member for bringing suit would be void, as against public policy. When a suit has been brought, it is, however, a defense to his claim to show that he has agreed to submit his demand to the tribunals of the lodge under the prescribed procedure. The defendant is not engaged in business for profit. It is a semi-charitable institution. It collects dues from its members merely to distribute to members in need, according to a plan agreed to by all. It would seriously interfere with the usefulness of these mutual aid societies if their funds could be tied up by endless litigation. These benefits are not charities in the strict sense. They are dues, which the society becomes obliged to pay in certain events. It is a matter of right, and not of grace. A consideration is paid, and the lodge reserves no right to withhold payments when the conditions arise. Yet the society has many of the features of an organized charity, and it has been said that the claim for a sick benefit is not a property right. In short, the rules of law have not been applied to these institutions with the same strictness with which they have been applied to corporations organized for profit. In an ordinary case I should be loth to hold that one can effectually waive his right to sue in a court of law before his right of action has arisen, or that he can in ad-

vance agree to an arbitration, but it has been so held with reference to these mutual benefit societies, and, with reference to them, I think the regulation reasonable: *Rood v. Railway etc. Assn.*, 31 Fed. Rep. 62; *Van Poucke v. Netherland etc. Soc.*, 63 Mich. 378; *Canfield v. Great Camp etc.*, 87 Mich. 626; 24 Am. St. Rep. 186.

But, even if this view were not correct, there can be no doubt of the proposition that he must first exhaust all the remedies afforded within the order before he can ³⁷⁰ maintain an action at law. No such fact is averred in the complaint, and, as I understand the record, although previous applications had been made for benefits which had accrued before the time during which the benefits here sued for accrued, there is no evidence which tended to show that any application at all had been made to the lodge for the amounts here sued for.

The authorities all seem to hold that this resource must be first exhausted. They are too numerous to admit of a full citation. In this state the following cases so hold: *Levy v. Magnolia Lodge*, 110 Cal. 297; *Robinson v. Irish etc. Soc.*, 67 Cal. 135. I can discover no support whatever for a contrary opinion in *Robinson v. Templar Lodge*, 97 Cal. 62. That case went off on demurrer to a complaint which merely showed a contract, by the terms of which, it was alleged, the benefit became due. The real nature of the contract, or of the organization of the order, did not appear. The opinion simply refers to such a contract as was alleged.

It was immaterial, if the above views are correct, whether the plaintiff could be required to submit his claim to a committee of the lodge or not; whatever tribunals the order established must be resorted to.

I see nothing unreasonable in a regulation which requires an application for benefits to be made within five weeks after the benefits accrued, even if the order may construe this to mean that in case of chronic illness the application must be renewed every five weeks. The order can control their procedure in such respects.

Entertaining the foregoing views, it is unnecessary to consider the rulings in regard to the instructions. Those asked by the appellant, and refused by the court, present the case upon the theory advocated by the appellant, and upon which he based his right to recover, that it was not necessary to exhaust his remedies under the laws of the order before he could maintain an action. His views upon that subject have been sufficiently discussed.

377 If appellant was wrong in his theory—as we hold—the court properly instructed the jury to find for the defendant. The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

BENEFICIAL ASSOCIATIONS—AMENDMENT OF CONSTITUTION AND BY-LAWS.—A contract between a member and the association cannot be enlarged or changed except by the consent of both contracting parties, but if the association expressly reserves the right to amend, and the member makes himself subject to whatever change the association may make in the contract, he is bound by the rules “now in force or which may hereafter be enacted,” and must take notice of the existence and effect of such reserved power: Monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 557.

BENEFICIAL ASSOCIATIONS—BY-LAWS—WHEN VALID.—A by-law of a mutual benefit association must be reasonable. Such an association may provide for the presentation of claims to its officers: Monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 558. See, also, *Earnshaw v. Sun etc. Soc.*, 68 Md. 465; 6 Am. St. Rep. 460; *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196.

Remedies of Members of Fraternal and Other Associations.*

In this country many societies or associations exist, some incorporated, and others not, some intended chiefly for the carrying on of trade and commerce and the realization of profits, and others having a social or benevolent object, but in all of which the members are, by the constitution or by-laws, or both, given certain rights and privileges of pecuniary or other value to them. One admitted as a member cannot subsequently be wholly denied the benefit of membership, as where he is expelled or his rights of membership otherwise entirely withdrawn from him, or, his continued membership being conceded, he is nevertheless refused some privilege or benefit, pecuniary or otherwise, to which he claims such membership under the existing circumstances entitles him. He may then seek redress in the courts, in which event two questions may arise: 1. Is he, under any circumstances, entitled to redress; and 2. If so, must his right be denied in the particular case, either because he has not sought his remedy within the association, or, having there sought it, it or its tribunals have already determined that he is not entitled thereto.

Injunctions.—The remedies usually sought in the courts may be preventive, restorative, or compensatory. They are preventive when the member, anticipating that he is about to be wrongfully expelled or denied some benefit of his membership, applies to a court for an injunction against the association, forbidding it to take the threaten-

*REFERENCE TO MONOGRAPHIC NOTES.

Voluntary associations: Note to *Otto v. Journeyman Tailors etc. Union*, 7 Am. St. Rep. 160-170.

Validity of the constitution, by-laws, and proceedings of voluntary charitable associations: Note to *Austin v. Searing*, 69 Am. Dec. 671-673.

ed action. There is, doubtless, an inclination against the issuing of injunctions in this class of cases, and there are some decisions from which the inference has been drawn that equity will in all cases refuse that character of relief, and, permitting the alleged wrong to be done, will leave the complainant to seek redress either within the association or by a resort to courts of law: *Baxter v. Board of Trade*, 83 Ill. 146; *Sturges v. Board of Trade*, 86 Ill. 441; *Gregg v. Massachusetts Medical Soc.*, 111 Mass. 185; 15 Am. Rep. 24. We admit that the cases in which relief by injunction is sustainable are infrequent, for the reason that by the constitutions, by-laws, and usual and recognized customs of associations of the character we are now considering, the expulsion of a member or the denial to him of any right to which his membership entitles him is a proper matter of investigation by the association, or some tribunal existing within it, and the member cannot anticipate that he will not have a fair trial according to the law and the usual rules of the association, and must submit to that trial, and, if he deems himself aggrieved by its result, must seek redress in some mode pointed out by the constitution and by-laws of the society. There are, nevertheless, cases which justify relief by injunction, as where it appears that the complainant, unless aided by the courts, will be expelled from the association for some cause which, under no circumstances, can justify his expulsion: *Otto v. Journeyman Tailors etc. Union*, 75 Cal. 315; 7 Am. St. Rep. 156; *Huston v. Reutlinger*, 91 Ky. 333; 34 Am. St. Rep. 225; *Leech v. Harris*, 2 Brewst. 571. The case cited from 91 Kentucky affords a good illustration of the necessity and propriety of this relief. An association consisting of underwriters interested in the insurance business had enacted a by-law undertaking to prescribe the number of solicitors which each member should employ, the time of their employment, and the compensation to be paid them, and to forbid contracts with solicitors making their salaries depend upon the number of risks they secured, and was about to expel one of its members for violating the by-law. The supreme court of the state, after determining that the by-law was contrary to law, and its enforcement against public policy, further decided that it would interfere by injunction to prevent such enforcement by the expulsion of the complainant. It said: "While members of voluntary associations must abide by their rules and regulations, unless contrary to the fundamental law of the order, or in violation of the law of the land, and even then the chancellor might be powerless to afford relief, still, when the suspension or expulsion results necessarily, as it must in this case, in affecting the financial standing of the appellees, as well as depriving them of the use of property that is common to all, however insignificant its value, we perceive no reason for denying the relief sought." So a court of equity may enjoin any act of an association toward one of its members which is unauthorized and unlawful, if he has not otherwise any remedy adequate for the protection of his rights. The president of the board of trade of Chicago was about to transfer certain certificates in his custody and belonging to a member of the board. In a controversy before a committee

of the board, a party interested offered certain evidence which was rejected by the committee. It was claimed that this evidence ought to have been received, that its exclusion deprived the party offering it of a substantial right, and that the action of the board or committee should, therefore, be enjoined. It was admitted that a member of the board was estopped from denying the jurisdiction of the committee when conferred by its constitution or by-laws, but it was affirmed that the members of the committee were "bound to proceed in conformity to the rules under which they were selected, and, if they failed to conduct the investigation in accordance with the charter and by-laws of the board of trade under which they were appointed, the complainant ought not to be bound by their judgment. It seems plain that where property rights are involved, as is the case here, the courts have the power to so far supervise the action of a tribunal like the one in question as to determine whether they have proceeded according to the rules and regulations provided for their action, and if they have failed in a substantial manner, correct abuses which may result from their unwarranted procedure." The court examined a number of decisions cited before it for the purpose of showing that a court of equity had no jurisdiction to interfere with the action of the board of trade, or of its committees appointed to settle the controversies submitted to them under the rules and regulations of the board, but it determined that in so far as any of the cases had employed language which might tend to the conclusion in support of which they were cited, such language was applicable only to those cases in which the society or its deciding board or committee had jurisdiction over the parties and subject matter, and had proceeded in the manner authorized by law and its charter: *Ryan v. Cudahy*, 157 Ill. 108; 48 Am. St. Rep. 305. See, also, *Rudolph v. Southern Beneficial Soc.*, 7 N. Y. Sup. Ct. 135.

Mandamus. — The only restorative remedy of which we are aware to which a member of an association may successfully resort is that of mandamus. In some instances, the same object has been sought to be accomplished by injunction to forbid the association from denying to the member the privilege of membership or the rights incident thereto, but it has been uniformly answered that relief of this character must be denied. In other words, the remedy by injunction is preventive, and not restorative: *Baxter v. Board of Trade*, 83 Ill. 146; *Fisher v. Board of Trade*, 80 Ill. 85; *Pitcher v. Board of Board*, 121 Ill. 412. Mandamus is not a revisory remedy, or, more accurately speaking, it is not a remedy adapted or ordinarily employed for the correction of mere errors of judgment or of proceeding. We shall hereafter show that a board or association of the character here under consideration generally reserves to itself by its constitution or by-laws the authority to proceed against its members for offenses against such constitution and by-laws, and, if found guilty, either to expel or to inflict some penalty upon them. In this and other cases in which there is reserved to the association or some committee or tribunal within it the right to inquire and determine either as to the commission of an offense against it or as to any other matter the determination of which may necessarily affect the

rights of its members, the inquiry and decision are judicial or quasi-judicial, in character, and are generally not subject to review in the courts, provided the proceedings have been regular and have not offended against the rules of the society or the laws of the land. One deprived of his membership or some right incident thereto as the result of such a decision cannot assail it or obtain restoration to his membership by mandamus. On the other hand, if he has been wrongfully deprived of his membership by expulsion, or some other right is denied him to which he is clearly entitled, he may, by mandamus, compel the association to restore him to membership or to concede to him the exercise of some other right, where it clearly appears that the cause for which he has been expelled or deprived of some other right was one on account of which such expulsion or deprivation is not justifiable, or the proceedings against him have been irregular in that he has not had notice of them or has been refused a hearing, or the proceeding or the hearing has been conducted in a manner inconsistent with the rules of the society or the laws of the land: *Medical Soc. v. Weatherby*, 75 Ala. 248. In those cases in which the grounds of the expulsion or suspension of a member are conceded, and they are not, in the opinion of the court, sufficient to warrant the action taken, there can be no doubt that it will by its writ of mandamus compel the society to restore him to membership: *Savannah Cotton Exchange v. State*, 54 Ga. 668; *State v. Georgia Medical Soc.*, 38 Ga. 608; 95 Am. Dec. 608; *Pulford v. Fire Department*, 31 Mich. 458; *Black & White Smiths' Soc. v. Van Dyke*, 2 Whart. 309; 30 Am. Dec. 263; *Commonwealth v. German Soc.*, 15 Pa. St. 251. If a by-law of an association provides one penalty for the offense, it cannot inflict another, nor can it nominally punish a member by expulsion for an offense for which such punishment is proper, if the offense really committed by him was of a different character and punishable by fine only. An expulsion of this character is not in good faith, and is contrary to natural justice. "When, under the guise of remedying the grievance of a member, the central body acts in bad faith and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may, however, to that extent be the subject of review": *Otto v. Journeyman Tailors etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156. A cause of expulsion designated as such in the constitution and by-laws of the society may, nevertheless, be inadequate, or the action condemned may be of a character which the law regarded as meritorious, and which it will not therefore permit to be punished. Thus if the constitution or by-laws of an association should require of its members acts in unlawful restraint of trade, and should provide for their punishment by expulsion for noncompliance with these rules of the association, the courts would doubtless not permit them to be carried into effect, and would restore a member expelled for violating them. Hence, it was held that where a medical society established a tariff of fees for medical services and fixed a minimum salary to be received by any member who should be appointed to a public office in a professional capacity, and adopted a resolution declaring that it should be dishonorable for any member to accept any

appointment or perform any services at a less sum than specified in the tariff of prices, and a member was expelled for violating this regulation, it was held that the regulation was void because unreasonable, against public policy, and contrary to law, and that mandamus would lie directing the association to restore its expelled member to membership: *People v. Medical Soc.*, 24 Barb. 570.

Though the cause of expulsion disclosed in resistance to an application for a writ of mandate may be sufficient to justify the action taken by the association, the writ may nevertheless issue, if its action was irregular to the extent of depriving the member of some substantial right which ought to have been conceded to him during the course of the proceedings against him. Mere irregularities not of a substantial nature are doubtless not sufficient to render the action of the association void, and will, therefore, not justify the issuing of the writ of mandate, and, even where they are of a substantial nature, it may appear that the member knowingly waived them, in which event he cannot afterward successfully urge them as grounds for his restoration to membership: *Sperry's Appeal*, 116 Pa. St. 391. Whether the suspension or expulsion was regular or irregular, or based upon a sufficient ground or not, the party aggrieved may lose his right to a writ of mandate for his restoration to membership by his laches in applying for it: *Meherin v. San Francisco Produce Exchange*, 117 Cal. 217.

Where a member is accused of any offense, and it is urged as a ground of his expulsion, it is indispensable that he have an opportunity to be heard in his defense: *Commonwealth v. German Soc.*, 15 Pa. St. 251. It is, therefore, always necessary that a member have notice of the proceedings against him, and though the by-laws expressly declare that any member neglecting to pay his arrearages for three months shall be expelled, they are not self-executing. Some action must be taken by the society declaring the delinquency and the expulsion, and this action must be preceded by a notice to the member of the charge against him: *Commonwealth v. Pennsylvania Beneficial Inst.*, 2 Serg. & R. 140. This rule is equally applicable to all other proceedings having for their object the expulsion of members: *Lysaght v. St. Louis etc. Assn.*, 55 Mo. App. 538. It is, of course, not fatal to the proceedings for expulsion that no formal notice to the member is given if he was present at the time fixed for his trial and permitted it to proceed without objection: *People v. Order of Foresters*, 162 Ill. 78. Mere regularity in the form of proceedings may be insufficient to sustain the action of the association if they were in substance manifestly unfair and in disregard of natural justice, as where, by denying to the accused the privilege of cross-examining witnesses against him, or otherwise, the association prevents him from making a full and complete defense: *Hutchinson v. Lawrence*, 67 How. Pr. 38. It results from the rule that mandamus may issue to compel an association to restore to membership an expelled member, where the offense of which he was convicted did not justify his expulsion, or where the proceedings have been irregular in substantial particulars, that the answer, or return to the writ, must show the action of the association to have been justifiable,

and, in order to do this, it must appear therefrom: 1. That the proceedings were substantially regular; and 2. That the cause of expulsion was sufficient: *Commonwealth v. German Society*, 15 Pa. St. 251. "It is the rule that the return must set forth distinctly all the facts essential to the conviction, both as to the cause of disfranchisement and the mode of proceeding. They must be set forth with sufficient certainty, and not argumentatively, inferentially, or evasively. If the by-laws of the association require that the expulsion must be founded upon sufficient evidence, the return to the writ must, at least, show that evidence was received at the trial, and that it was deemed to be sufficient, and a statement that the member was expelled "according to the terms of the constitution and by-laws" is not sufficient: *Society etc. v. Commonwealth*, 52 Pa. St. 125; 91 Am. Dec. 139. If, by the laws of an association or corporation, slander against it by a member is an offense for which he may be fined or expelled, it will be held that an offense something analogous to the common law of slander as applicable to individuals is intended, and in the return to the writ the alleged slanderous words must be set forth, to enable the court to determine whether they were slanderous. Furthermore, where the corporation is required to keep records, the proceedings necessary to authorize its action against an accused certainly must appear in the record. These records should show upon their face the exact cause of the expulsion and all the proceedings necessary to authorize it: *People v. Mechanics' Aid Soc.*, 22 Mich. 86.

Actions for the Recovery of Money or Property.—The compensatory remedies of a member against an association which denies him some property right to which he is entitled are the same as if he were entitled to the same right or property from a natural person or a private corporation which refused to concede it. If the contingencies have arisen in which the association has agreed to pay him a sum of money, an action may be maintained therefor as in the case of any other creditor against a debtor: *Supreme Order v. Stein*, 120 Ind. 270; *United Workmen v. Zuhlke*, 129 Ill. 298. If, on the other hand, a member has become entitled to specific property, real or personal, doubtless his right thereto can be enforced against the association by replevin, ejectment, or any other appropriate action or proceeding. Nor is it possible to change the character of his rights, or to deprive him of a remedy for their enforcement by declaring the obligation of the association to be noncontractual and incapable of enforcement in the courts: *Robinson v. Templar Lodge*, 117 Cal. 370; ante, p. 193. This statement must not be understood as equivalent to an assertion that there is always a remedy in the courts, for according to the customs and by-laws of these associations, the primary, and often the exclusive, remedy of an aggrieved member is within the associations themselves.

Necessity of Pursuing Remedies Within the Association.—Probably there is no presumption when a member claims to have been denied some privilege or benefit that there is some remedy for him within the association, and therefore it may be that a complaint is not subject to demurrer for not stating either that the association does not afford such remedy, or that,

where it is afforded, resort to it has been without success: *Olery v. Brown*, 51 How. Pr. 82. There are, however, few associations or corporations which by their own rules do not point out a course of procedure to be taken by a member seeking to enforce some right or to resist what he deems to be some wrong to himself. In the absence of any remedy provided by the laws of the association, relief may be had in all cases, where rights of property are involved, by proper suits or actions in the courts: *Kumle v. Grand Lodge*, 110 Cal. 204. If, on the other hand, some course of procedure is designated by the rules of the association we think the decisions uniformly assert that until a member pursues that course and finds it unavailing, the courts will not interpose in his behalf, whether the remedy he asks of them is preventive: *Mead v. Sterling*, 62 Conn. 586; *Thomas v. Musical etc. Union*, 121 N. Y. 45; *Olery v. Brown*, 51 How. Pr. 82; *Whiteside v. Noyas etc. Assn.*, 23 N. Y. Supp. 63; 68 Hun, 565; restorative: *People v. Women's etc. Co.*, 162 Ill. 78; *Screwmen's Ben. Assn. v. Benson*, 76 Tex. 552; or compensatory: *Harrington v. Workman's Ben. Assn.*, 70 Ga. 340; *Ryan v. Lamson*, 44 Ill. App. 204; *Grand Cent. Lodge v. Grogan*, 44 Ill. App. 111; *Karcher v. Supreme Lodge*, 137 Mass. 368; *Levy v. Magnolia Lodge*, 110 Cal. 297; *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Lafond v. Deems*, 81 N. Y. 507. Thus where a beneficial association agrees to pay its members certain sums weekly while disabled by sickness, it may, in its by-laws, prescribe that application for such weekly payments shall not be received or acted upon except through a particular committee, after the furnishing of a physician's certificate, in which event, no member can entitle himself to a benefit except by compliance with the by-law: *Harrington v. Workman's Ben. Assn.*, 70 Ga. 340; *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196. If an association has made any decision against a member which he deems to wrongfully and injuriously affect him and an appeal is provided by the constitution and by-laws of the association to some higher authority, that remedy also must be exhausted before the courts will assume jurisdiction: *Mead v. Sterling*, 62 Conn. 586; *Karcher v. Supreme Lodge*, 137 Mass. 368; *Oliver v. Hopkins*, 144 Mass. 175; *Screwmen's Ben. Assn. v. Benson*, 76 Tex. 552.

Doubtless a member may, in some instances, excuse himself from compliance with some rule of the order, or from pursuing some remedy prescribed thereby, by in effect showing that his right to comply with such rule or to pursue such remedy has been denied him by the association or some officer thereof whose action has, by the association, been made a prerequisite to the consummation of a cause of action against it. Neither the association nor any of its officers can exclude a member from redress by refusing to perform some act which he is clearly entitled to have done in order that his claims may be fairly submitted for decision to the association or some tribunal within it authorized by its by-laws to consider and determine such claims: *Supreme Order v. Stein*, 120 Ind. 270; *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196.

The Effect as Res Judicata of Decisions Within the Association.—The necessity for a resort to the remedy provided by the by-laws of an association

being conceded, the next question naturally presenting itself for consideration is, To what extent is a member bound by the decision against him of a question presented to, and determined by, the tribunals of the association? There can, we think, be no reasonable doubt that these tribunals are judicial or quasi-judicial in their functions, and that their decisions, therefore, may have the effect of *res judicata*, and preclude any further inquiry respecting the questions determined thereby: *Freeman on Judgments*, sec. 531; *Bachman v. New York etc.*, 64 How. Pr. 442. It is, of course, as essential to the conclusive effect of decisions by the tribunals of an association as it is of all other judicial or quasi-judicial tribunals that they have jurisdiction both over the person and the subject matter, and further that they have authority to inflict the penalty inflicted for the offense found to have been committed. If a society expels a member or otherwise decides a question against him, prejudicially affecting his rights, without giving notice of the accusation against him (*Von Arx v. San Francisco etc. Verein*, 113 Cal. 377; *Lysaght v. St. Louis etc. Assn.*, 55 Mo. App. 538; *Commonwealth v. German Soc.*, 15 Pa. St. 251), or, though giving such notice, proceeds against him while he is insane, and thereby rendered incompetent to protect himself (*United Workmen v. Zuhlke*, 129 Ill. 298), or proceeds against him in a manner different from that prescribed by the by-laws of the association, or inflicts a penalty not permitted by law for the offense charged, the decision is void, and though a remedy by appeal exists, it need not be resorted to: *Mulroy v. Supreme Lodge*, 28 Mo. App. 463; *Hoeffner v. Grand Lodge*, 41 Mo. App. 359; *Knights of Pythias v. Eskholme*, 59 N. J. L. 235; *post*, p. 000. A member may, however, become bound by a void decision, as where he apparently acquiesces in it. Thus, if a sentence of expulsion from the association is pronounced against him, and he neither appeals from it nor keeps paid his subsequently accruing liability for dues, and for a long time neither claims the privileges nor assumes the burdens of membership, from these facts it may justly be inferred that he ratified the void sentence and estopped himself from subsequently assailing it: *Gardon v. Supreme Lodge*, 50 Mo. App. 45. See, also, *Meherin v. San Francisco Produce Exchange*, 117 Cal. 217. A judgment of a regularly constituted court is treated as being without jurisdiction to support it, however regular the proceedings up to that point, if the party against whom the judgment was rendered was refused a hearing: *Freeman on Judgments*, sec. 121; *Henry v. Carson*, 96 Ind. 412; *Windsor v. McVeigh*, 93 U. S. 274. Doubtless there may have been proceedings within associations affecting the interests of one of its members in which, though he was regularly summoned and appeared before it, the conduct of his judges showed that they substantially denied him the right of defense and proceeded against him, not in the spirit of judges, but arbitrarily, capriciously, and in defiance of his rights. To such proceedings it would be difficult to accord the effect of *res judicata* to the extent of denying the aggrieved member a right to resort to the courts: *Hutchinson v. Lawrence*, 67 How. Pr. 38; *Supreme Council*

v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196; Edwards v. Aberayon etc. Soc., L. R. 1 Q. B. Div. 563. But, conceding jurisdiction to exist in the sense that the member was given an opportunity for defense and a fair hearing, or, at least, a fair opportunity for a hearing upon the merits, and that the penalty inflicted upon him was one that the society might lawfully inflict for the offense of which he was found guilty, it is difficult, if not impossible, to deny to its decision the conclusive effect of a final judgment of a tribunal of special jurisdiction, having authority to decide the question decided and to render the judgment pronounced.

It is well known that the courts look with disfavor upon agreements tending to oust them of their jurisdiction, and will not ordinarily enforce executory contracts to refer to arbitration the question, whether one of the parties is entitled to recover of another, though contracts of this character are commonly conceded validity in so far as they require amounts of values and perhaps some other matters which do not go to the unit of the action, to be determined prior to its commencement by resort to arbitration: Note to Commercial Union etc. Co. v. Hocking, 2 Am. St. Rep. 565-572. In a few of the states, provisions in the constitutions or by-laws of fraternal societies or in the contracts of mutual benefit associations performing substantially the functions of insurance corporations, requiring the submission of claims to some body or tribunal within the order or association, and providing that the decision of such claims by the body or tribunal shall be final, have been held to fall within the general rule alluded to above, denying the right of parties to make agreements which will oust the court of jurisdiction; and hence resort to the courts has been sustained, though the question in controversy had already been submitted to a tribunal of the association and decided adversely to the plaintiff: Bauer v. Samson Lodge, 102 Ind. 262; Supreme Council v. Garrigus, 104 Ind. 133; 54 Am. Rep. 298; Supreme Council v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196; Austin v. Searing, 16 N. Y. 112; 69 Am. Dec. 665; Poultney v. Bachman, 10 Abb. N. C. 252.

It is not possible by contract or by the constitution or by-laws of an association to deprive a member having a cause of action against it of all right to resort to the courts. If so, he would be without remedy even when the association itself had decided in favor of his claim, if it or its officers failed to make payment or to provide means therefor. Where, however, for the purpose of ascertaining whether any right of action exists, it is necessary to make any investigation or to decide any question, we see no reason why a member may not agree that such investigation may be made and a decision thereon had within the association by some course of procedure provided for by its by-laws, and that such investigation and a decision thereon in favor of a member shall be indispensable conditions precedent to his cause of action against the association. There is one class of cases in which there is naturally some disinclination to apply this rule. We refer to those associations which issue to their members certificates having the characteristics of policies of insurance, either on life or of property, and which purport to entitle the holder of the

certificate or some beneficiary designated therein to a specific sum of money on the happening of the loss against which the insurance was effected. The board, tribunal, or association making the decision against a member holding a certificate is generally interested in the question decided, and may be presumed to have a bias in favor of his own interest and against the claim submitted for decision, and courts will surely and properly evince a desire to relieve a member when, because of such bias or from any apparent unfairness in the proceedings, his claim seems not to have been fairly considered and impartially decided. Thus in a case where the decision of the directors of a mutual insurance association was questioned, one of the judges remarked: "In my opinion, these proceedings of the directors were unjustifiable, and can only be accounted for consistently with honesty and good faith by supposing that they had mistaken their real position, and supposing that, being agents of the society, they had no duty to perform toward the plaintiff. It is beyond doubt, however, that when they undertook the delicate task of adjudicating between their own society and the member, their functions, if not strictly the same, were analogous to those of an arbitrator, and they were bound to act judicially and with perfect fairness and impartiality between the parties. To come to a decision under these circumstances in favor of their own society and against the plaintiff, without hearing him or giving him an opportunity of being heard, was contrary to every principle of justice, and ought not, I think, to be held by any court of law or equity to be binding upon him": *Edwards v. Aberayon etc. Soc.*, L. R. 1 Q. B. Div. 563, 579. In this case, the judges of the appellate court united in agreeing that the decision of the directors did not deprive the plaintiff of his right to resort to the courts, but the reasons assigned by the several judges were different and not entirely harmonious. Some of them were undoubtedly inclined to regard an agreement requiring the assured to pursue his remedies only within the society and to submit his claim to the decision of its tribunals as contrary to public policy, and therefore proper to be disregarded by the courts, but such were not, in our judgment, the views of the majority of the judges, and we see nothing in the English decisions coming within our observation inconsistent with the general rule, that the decision of an association or of its tribunals made in good faith and after such proceedings as are required by its rules is binding upon its members: *Scott v. Avery*, 5 H. L. Cas. 811; *Tredwin v. Holman*, 1 Hurl. & C. 72; *Elliott v. Royal etc. Co.*, L. R. 2 Ex. 237; *Dawson v. Fitzgerald*, L. R. 9 Ex. 7.

In some American cases, it is said that while agreements making the decisions of an association conclusive upon its members are not invalid and may be enforced, yet that such agreements must be express, and the language employed must necessarily exclude a resort to the courts. Otherwise, though the question has been submitted for decision and decided against the member, he may bring an action against the association, and recover, if the courts think a recovery proper: *Railway Conductors v. Robinson*, 147 Ill. 138; *Supreme Lodge v. Raymond*, 57 Kan. 647. It is, in our judgment, absurd to say that the decisions of these tribunals are judicial or quasi-judicial in

character and yet to affirm that a member is not bound by them, for, under the well-recognized principle that estoppels must be mutual (Freeman on Judgments, sec. 159), if a member is not bound by the decision, neither ought the association to be. Where a member is regularly proceeded against for the purpose of expelling him from an association, and after a hearing, or an opportunity to be heard, has been accorded him, he is found guilty of the offense charged and thereupon expelled, we apprehend that the courts agree with substantial, if not with absolute, unanimity that the sentence of expulsion is conclusive against him, if the offense of which he was convicted justified it. A member who has been expelled cannot by resorting to the courts by way of proceedings to compel his restoration to membership, or otherwise, relitigate the questions of fact which have regularly been determined against him by the association or by some committee or tribunal therein authorized by its constitution or by-laws to investigate and determine the question: *Otto v. Journeyman Tailors etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156, and note; *Peyre v. Mutual etc. Soc.*, 90 Cal. 240; *Beesley v. Chicago Journeymen etc. Assn.*, 44 Ill. App. 278; *Noel v. Modern Woodmen*, 61 Ill. App. 597; *Board of Trade v. Nelson*, 162 Ill. 431; 52 Am. St. Rep. 312; *Society etc. v. Commonwealth*, 51 Pa. St. 125; 91 Am. Dec. 134; *Black and White Smiths' Soc. v. Van Dyke*, 2 Whart. 309; 30 Am. Dec. 263; *Commonwealth v. Union League*, 135 Pa. St. 301; 20 Am. St. Rep. 870; *Screwmen's Ben. Assn. v. Benson*, 76 Tex. 552. The same rule must, upon principle, be equally applicable in all other cases where such constitutions or by-laws have provided for submission and determination within the association of any other question by the determination of which a member may feel himself aggrieved. It is true that in many of the cases affirming and applying this rule the constitution or by-laws of the association to which the member had subscribed or otherwise assented, or some contract accepted by him with apparent acquiescence, had expressly provided for the effect of such decision: *Levy v. Magnolia Lodge*, 110 Cal. 297; *Robinson v. Templar Lodge*, 117 Cal. 370; ante, p. 193; *Croak v. High Court*, 162 Ill. 298; *Canfield v. Great Camp*, 87 Mich. 626; 24 Am. St. Rep. 186; *Smith v. Ocean Castle*, 59 N. J. L. 198; *Rood v. Railway etc. Ben. Assn.*, 31 Fed. Rep. 62. We cannot conceive that there is any necessity for the employment of any express stipulation upon this subject. Whenever, by his assent to the constitution and by-laws or otherwise, the member has, in effect, stipulated that any matter affecting him as a member of the association shall be the subject of inquiry and decision by it or any tribunal thereof, he must necessarily understand that such inquiry and decision shall not be idle proceedings, but shall; on the other hand, if regularly pursued and not manifestly affected by capricious or arbitrary action, or by substantially denying to him the right to present his defenses, on the merits, be equally binding upon him and upon the association, and that such decision shall not, therefore, be re-examinable in any court of law or equity, except to the extent of inquiring whether the proceedings against him in the association or its tribunals were regular and fair,

and further, whether the penalty which it has undertaken to inflict upon him was one which it might lawfully impose as the result of the decision made against him: *Connelly v. Masonic etc. Assn.*, 58 Conn. 552; 18 Am. St. Rep. 296; *Railway Conductors v. Robinson*, 147 Ill. 138; *Woolsey v. Independent Order of Odd Fellows*, 61 Iowa, 492; *Anacosta Tribe v. Murbach*, 18 Md. 91; 71 Am. Dec. 625; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Canfield v. Great Camp*, 87 Mich. 626; 24 Am. St. Rep. 186; *Mayer v. Journeymen Stone-Cutters Assn.*, 47 N. J. Eq. 519; *White v. Brownell*, 2 Daly, 329; *Harrison v. Hoyle*, 24 Ohio St. 254; *Baker v. Forest City Lodge*, 28 Ont. Rep. 238.

WASSERMANN v. SLOSS.

[117 CALIFORNIA, 425.]

CONTRACTS, ILLEGAL, RECOVERING MONEYS ADVANCED UNDER.—If two or more persons enter into a scheme or contract, immoral, or against public policy, and one gives to the other property to be used in the furtherance of their illegal plan and for the purpose of bribing persons in high official station, and the receiver does not use it for that purpose, but applies it to his own use, he is answerable therefor to the person of whom he thus obtained such property.

A BAILEE OF GOODS FOR AN UNLAWFUL PURPOSE holds them as agent of the bailor until they are applied to such purpose, and until so applied they may be recovered by the bailor. He has the right to withdraw from the illegal scheme at any time before his money or property is applied thereto.

A NONSUIT cannot be granted because of mere variance between the plaintiff's complaint and the evidence of his witnesses.

Dorn & Dorn and Theodore Savage, for the appellant.

Chickering, Thomas & Gregory and Gerstle & Sloss, for the respondent.

⁴²⁵ **GAROUTTE, J.** By this action it is asked that a certain four hundred shares of stock of the Alaska Commercial ⁴²⁶ Company be declared to be held in trust by defendant for the benefit of plaintiff, and that an accounting be had of the earnings of said stock while so held. Defendant set up title to the stock in himself. Plaintiff offered evidence in support of his case, and, upon motion, was nonsuited. He moved for a new trial, which motion was denied, and thereupon appealed to this court from the judgment and order denying his motion.

The motion for the nonsuit was based upon five distinct and separate grounds, and it was granted by the trial court solely upon the fourth ground. In view of the law that, if any of the grounds upon which the motion was based justified the action of the trial court, then the order of said court will be affirmed upon appeal,

appellant's counsel in their brief have reviewed and discussed these grounds seriatim in detail. In reply, respondent's counsel, for the purpose of sustaining the action of the trial court in granting the nonsuit, have limited themselves to the fourth and fifth grounds stated in the motion. For these reasons, this court will likewise limit its consideration to those grounds, deeming respondent's present position a waiver of the remaining grounds insisted upon at the hearing of the motion before the lower court.

The trial court granted the nonsuit upon the fourth ground, namely, that the action was one which attempted to enforce a contract that was against sound morals and public policy. The pith of the action disclosed by the complaint as bearing upon this particular question of morals and public policy may be stated substantially in a few words. Defendant Sloss was president of the Alaska Commercial Company, a corporation engaged in the sealing industry in and about the territory of Alaska. It held certain leases from the government of the United States and also that of Russia. Plaintiff was a stockholder in this corporation. These leases were soon to expire; and a renewal of them was greatly desired by the corporation. Defendant, as president of the corporation, was actually engaged in the ⁴²⁷ effort to secure such renewals. He represented to plaintiff "that, in order to obtain such new leases, or any or either of them, it would be necessary for him, the defendant, to be in such a position as to enable him to interest certain persons high in authority and influence in the respective undertakings and with the respective governments aforesaid. That all of the members of said company should be willing to make some sacrifices to that end; that in order to place the defendant in a position to interest certain persons high in authority and influence in the said respective undertakings, and that to successfully negotiate the obtaining of the said new leases respectively, it would be indispensable for him, the said defendant, to have a certain amount of stock of the old company at his disposal, to be used by him in and about the procuring of the said new leases; and that said negotiations could not be successfully conducted by the defendant unless he had the said shares of stock at his disposal, to be used in the manner hereinbefore stated. The said defendant then requested of the plaintiff that he, plaintiff, should transfer to the defendant four hundred shares of the capital stock of said company (out of the fourteen hundred shares so owned by plaintiff as aforesaid), and represented, promised, and agreed to plaintiff that he, the defendant, would use the said shares of stock so placed at his disposal by plaintiff, as

aforesaid, in the course of said negotiations looking toward the obtaining of the new leases respectively, and for the purpose of influencing certain persons high in authority and influence with reference to the government of the United States and that of Russia, respectively, whose good offices it would be necessary to obtain to that end." The plaintiff believed these statements of the defendant, and, relying upon them, transferred to him four hundred shares of said stock, to be used for the purposes aforesaid. The complaint further alleges that this stock was thereupon converted by defendant to his own use. As tending to show a contract ⁴²⁸ against good morals and public policy, after a careful consideration of the evidence, we are prepared to say that it is weaker than the allegations of the complaint. And, if the objection here insisted upon as to the character of this evidence is good, then an objection could well have been taken to the complaint at the very inception of the litigation.

This case has been thoroughly argued, and a great portion of that argument has been addressed to the character of the contract entered into between these parties. But from the standpoint at which we view the litigation that question is immaterial. We are satisfied that the action is in no sense one to enforce a contract. Whatever relationship the transaction pictured by the aforesaid recitals of the complaint bears to the cause of action, it is a relationship disaffirmed and repudiated. The good or bad morals of this undertaking is immaterial, for the reason that the venture was in no sense executed, and until executed both parties are given an opportunity for repentance and rescission. Seeing the error of his ways, the law says a party may withdraw from the transaction; and it extends to him a helping hand by offering the inducement of giving back to him anything of value with which he has parted. Putting this case against plaintiff as bad as may be imagined, he transferred his stock to be used by defendant in corrupting servants of the respective governments. The transaction progressed no further. The stock was not so used. The precipice which would have been death to plaintiff's cause of action was never reached. No one was corrupted, and the stock was not stained. The parties' intentions as to the use to which this stock was to be put are not the controlling factor. It is not what was intended to be done with the stock that christens the transaction, but rather what was actually done. If defendant had disposed of the stock as contemplated, plaintiff would have had no remedy, for the evil would have been accomplished, the

harm would have been done, and of necessity his plea for relief would not have been heard.

⁴²⁹ In this case plaintiff gave certain stock to defendant to be used for a certain purpose. He was plaintiff's bailee of the stock. The bailee did not use it for the purpose agreed upon, but took it to his own use. There is no principle of law to justify such a transaction. If plaintiff upon the second day subsequent to the transaction had changed his mind and notified defendant of such change, and demanded a return of his stock, upon principle and authority he would have been entitled to such return. The authorities all hold that, if he had done this any day prior to the time when the agreement was fully executed, he would have been entitled to a return of his stock. That this agreement was purely executory cannot be questioned. It could not be executed until the stock was applied to the purposes intended. If the question as to what company should obtain the leases here sought were still an open one, if it had not been settled at the commencement of this action, and if the stock had not been applied as contemplated, then, certainly, plaintiff could recover. The fact that these leases have been secured by other parties is wholly immaterial. That fact does not enter as an element in the question here discussed, and upon principle the case stands exactly as it did a moment after the stock was transferred to the defendant.

The authorities seem to be in direct accord with the views we have expressed. Our investigation has led us to the examination of many cases aside from those cited by counsel, and we find no case opposed to the doctrine of a right of recovery upon the part of a plaintiff where similar facts are presented. There are hundreds of cases found in the reports of this country and England where courts have refused to entertain actions based upon unlawful or void contracts. Our state reports contain many of them. At the present day it may be said that all courts agree upon that doctrine: In *Langton v. Hughes*, 1 Maule & S. 593, a case which is the landmark upon this question in English reports, it is held that a druggist is not entitled to recover for drugs sold ⁴³⁰ a brewer which he knew were to be used by the brewer in unlawful manufacture. The judge declared that by such sale the druggist aided and abetted the brewer in violating the law. A common and simple illustration is found where an action is brought to recover money loaned to another for the purpose and intention of playing a gambling game prohibited by law: *McKinnell v. Robinson*, 3 Mees. & W. 434; *Tyler v. Carlisle*, 79 Me. 210; 1 Am. St. Rep. 301.

The case at bar upon its facts does not bring it within the rule declared by the foregoing authorities. Those are all actions to recover money agreed to be paid upon illegal contracts. It was sought to enforce agreements made by contracting parties. Here Sloss was the agent or bailee of the plaintiff. He was given stock to be used by him for a certain purpose. The stock was still the property of the plaintiff, the title was still in him. Sloss, as long as he retained possession of it, as long as he did not apply it according to instructions, held it purely as the agent of the plaintiff. He could only apply it to the single purpose authorized. If he converted it to his own use it would be criminal embezzlement, and for a court to support his present position would not be in the interest of sound public policy, but, on the contrary, would be offering a premium upon the dishonesty of agents, servants, and bailees. It is said in *Norton v. Blinn*, 39 Ohio St. 149: "In the second place, it is contrary to public policy and good morals to permit employes, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations."

In this case, if the stock had been applied to the purposes intended, plaintiff would have no standing in court, for, in the language of many cases, the unlawful purpose would have been carried out; and this principle applies in all those cases where money or ⁴³¹ property is given to another party to be used in an illegal transaction. Persons may not be punished either in civil or criminal courts for unlawful intentions. It is the consummation of these unlawful intentions that places a party without the law. If the unlawful intention or transaction is not carried out, if nothing is done under it, my servant has my property, and I am entitled to its return. As in the present case, he is acting under a special agency which I have a right to revoke at any time before performance, and, when so revoked, I am entitled to my own. It cannot be better public policy to deny me a recovery of the stock than to encourage my agent to commit a criminal offense.

Dunlap's *Paley on Agency*, star page 66, declares the general principle thus: "As long as money deposited with an agent for any illegal purpose remains unemployed, or if the purpose be countermanded by the principal before the application, it is a debt which may be recovered at law or in equity." Wood on *Master and Servant*, section 202, says: "While the courts will not

enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction." In *Adams Exp. Co. v. Reno*, 48 Mo. 264, it was held that Reno, who had deposited a certain sum of money in the bank, which money was to be paid to a sheriff when he secured the pardon of Reno's brother, who was then in the penitentiary, could recover the money as his money as long as it remained in the possession of the bank. *Taylor v. Lendey*, 9 East, 49, is a case where plaintiff gave a sum of money to the governor of the poorhouse to be used for the use of the poor, a magistrate agreeing to stifle a threatened prosecution against him in consideration thereof. Plaintiff brought an action to recover the money so given to the governor. Lord Ellinborough said: "Take it that the money had been ⁴³² paid by the plaintiff to the defendant for a charitable purpose, but, before the defendant had made any application of it, the plaintiff countermanded the payment. Was there not an end of the authority, and could the agent persist in applying it against the direction of his principal? The question, therefore, is reduced to the case of a countermanded agent." In *Peters v. Grim*, 149 Pa. St. 164, 34 Am. St. Rep. 599, referring to an unlawful transaction in stocks, the court said: "If, when the first deposit was made by plaintiff, with directions to buy the stock, he had countermanded the directions before anything was done under them, it could not be pretended that defendant could have retained the money on the ground of illegality in the contemplated transaction. Intent as to a future act does not make illegality." In *Morgan v. Groff*, 4 Barb. 524, it is held: "That as long as money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded by the principal before its application, it is a debt which may be recovered from the agent by the principal, either at law or in equity." That was a case where money was given to an agent to be bet upon an election, which money the agent failed to bet but converted to his own use. In *Bone v. Ekless*, 5 Hurl. & N. 924, the owner of a ship authorized his agent to sell the same for six thousand five hundred pounds to the Turkish government, and to expend five hundred pounds of that amount in bribing government officials to assist in making the sale. The ship was sold and the agent paid out three hundred pounds, of the five hundred as contemplated. In an action the

owner was held entitled to recover the two hundred pounds, notwithstanding the agent pleaded the facts showing the use to which the money was to be applied—one of the judges saying: “But the real nature of the case is that the plaintiff received the whole of the money upon the sale of defendant’s ship, and claims to retain part of the money upon the illegal arrangement, which, however, he has not ⁴³³ carried out. He might have discharged himself by actual payment of the money, but he has not paid it; the illegality would have been the payment for illegal purposes. Before that was done the defendant claimed the money, and was entitled to recover it”: See, also, *Taylor v. Bowers*, L. R. 1 Q. B. Div. 291. In *Johnston v. Russell*, 37 Cal. 670, the law is declared that either party to a wagering contract upon the election may withdraw from the transaction at any time before the event upon which the result of the wager is dependent has happened, and under such circumstances the party withdrawing may recover his money from the stakeholder. From the legal principle declared by that case it necessarily follows that the same party could have recovered his money from an agent to whom he had given it to be wagered. When the money has passed into the hands of the stakeholder the law has been violated. When it is in the hands of the agent or servant to be wagered no violation of the law has yet occurred. It follows that the doctrine of the above case goes to lengths beyond anything demanded by the facts of the case at bar. It will thus be seen from the array of cases cited that authority is not lacking to support plaintiff’s right of recovery. There are cases containing incidental statements that may look the other way; but the facts there are not the facts of this case. In those cases it will be found that the plaintiff relied upon an illegal contract for a recovery, and the statements made were not necessary to the decision of the case, and not called for by the facts before the court.

The court is asked to sustain the order granting the motion for a nonsuit upon the fifth ground stated. It is claimed by respondent’s counsel that a serious “variance” exists between the evidence of plaintiff and his principal witness, Seligman. Conceding such a variance to exist, any question arising from it cannot be raised upon a motion for nonsuit. It is but fair to respondent Sloss to say that by his answer he in no way relies upon the illegality of any contract entered into ⁴³⁴ between himself and Wassermann for the purpose of defeating Wassermann’s

cause of action. He claims that he purchased the stock from Wassermann and relies upon his title under such purchase.

Judgment and order reversed and cause remanded for a new trial.

Harrison, J., and Van Fleet, J., concurred.

CONTRACTS—ILLEGAL—ACTIONS UPON.—No legal protection is given to prohibited contracts, prohibited trades, or prohibited things; but persons are never outlawed, and their property is under the protection of the state, even when used improperly: *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 419. See note to *Tracy v. Talmage*, 67 Am. Dec. 153. While the law does not draw fine distinctions in ascertaining equality of wrong, it recognizes the fact that one party to an arrangement by which he is defrauded by the misrepresentation of another is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver and who commits fraud by means of his persuasive or other influence over his victim. And even actual knowledge of legal rights and liabilities is not always conclusive against relief: *Hess v. Culver*, 77 Mich. 598; 18 Am. St. Rep. 421, and note. See *Bell v. Campbell*, 123 Mo. 1; 45 Am. St. Rep. 505, and note.

BAILMENT FOR UNLAWFUL PURPOSE—RIGHTS OF BAILOR.—The owner of property placing it in the hands of another to be used temporarily for unlawful purposes does not forfeit his property in the thing thus delivered: *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310.

TRIAL—NONSUIT—WHEN GRANTED—VARIANCE.—In the absence of all testimony in support of the material allegations of the complaint a nonsuit is proper; but when there is any testimony directed to those allegations, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury: *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 38 S. C. 365; 37 Am. St. Rep. 767, and note. An amendable variance between the declaration and the proof is no ground of nonsuit: *Boorman v. Jenkins*, 12 Wend. 568; 27 Am. Dec. 158; but see *McPherson v. McPherson*, 11 Ired. 391; 53 Am. Dec. 416.

PEOPLE v. GRIFFIN.

[117 CALIFORNIA, 583.]

RAPE.—WHETHER A WOMAN POSSESSES MENTAL CAPACITY SUFFICIENT to give consent must, saving in exceptional cases, be a question of fact for the jury.

RAPE.—WANT OF KNOWLEDGE THAT THE FEMALE IS IN LAW DEEMED INCAPABLE OF CONSENT either because she is not of the age of consent, or does not possess the mental capacity requisite to give it, is not a defense to a prosecution for rape. A man seeking illicit intercourse with a woman must ascertain at his peril whether she has the age and mental capacity required to make her consent a protection to him.

EVIDENCE OF MENTAL INCAPACITY.—Upon a prosecution for rape, where it is claimed that the female did not have mental capacity to consent, evidence is properly admitted to show that

she had been feeble-minded since early childhood, and that she was at the time of the trial, some six months after the alleged offense, an inmate of an institution for the feeble-minded.

George L. Hood and W. P. Thompson, for the appellants.

Harris & Hubbard, for the respondents.

⁵⁸⁴ HENSHAW, J. The defendant, charged with the crime of rape, was convicted of an attempt to commit rape. From the judgment and from the order denying him a new trial, he prosecutes these appeals.

By the evidence of the people it appeared that the victim was a feeble-minded girl about eighteen years of age. She and her brother were alone upon their ranch when defendant, and a companion by the name of Love, drove up. To accomplish their design they inveigled the brother away from his home. He, returning, heard his sister crying, and, entering her bedroom, discovered defendant in flagrante delicto.

At common law, where the elements of force upon the part of the assailant, and resistance upon the part of the woman, were always regarded as essentials to the crime, much difficulty was experienced by the judges in bringing many cases, calling aloud for punishment, within the strict definition of the offense. The result, as may be conceived, was that the courts, between their natural desires, upon the one hand, to punish the wicked, upon the other to maintain the integrity of the law, were driven to extreme niceties of distinction. The books are thus full of cases which are to-day of more interest for the acumen displayed, than for any light which they shed upon the matter.

For, in this state, all these questions have been solved and finally disposed of by the express language of our statute. This, while still entitling the crime rape, embraces in its subdivisions some offenses not cognizable ⁵⁸⁵ as such at common law, and others which only after much stress and perturbation upon the part of the judges were finally determined to come within the purview of that crime.

Of these offenses, grouped by our statute under the name of rape, the one with which we are here particularly concerned is that designated in subdivision 2 of section 261 of the Penal Code:

"Sec. 261. Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: . . . 2. Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent."

In this species of rape neither force upon the part of the man, nor resistance upon the part of the woman, forms an element of the crime. If, by reason of any mental weakness, she is incapable of legally consenting, resistance is not expected any more than it is in the case of one who has been drugged to unconsciousness, or robbed of judgment by intoxicants. Nor will an apparent consent in such a case avail any more than in the case of a child who may actually consent, but who, by law, is conclusively held incapable of legal consent.

Whether the woman possessed mental capacity sufficient to give legal consent must, saving in exceptional cases, remain a question of fact for the jury. It need but be said that legal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences. This degree of intelligence may exist with an impaired and weakened intellect, or it may not.

Defendant proposed the following instruction, which was given by the court with the elimination of the words embraced in parentheses: "Mere weakness of mind on the part of a woman does not disbar or disable her from consenting to an act of sexual intercourse, and one of less degree of intelligence or capacity than is necessary to make a contract may consent to carnal connection so ⁵⁸⁰ that the act will not amount to rape in the man; but if a woman is, through lunacy or other unsoundness of mind, whether temporary or permanent (so idiotic) as to be (absolutely) incapable of giving legal consent, the connection with her is rape (if the man be, at the time of the connection, aware of her mental condition)."

Defendant's special complaint is over the elimination of the condition "if the man be at the time aware of her mental condition." It is here insisted that defendant's evidence disclosed that he had no knowledge of her mental incapacity, and such, indeed, is his evidence. It is further contended that, in the absence of such knowledge, or of reasonable means for acquiring such knowledge, he may not be convicted.

But with this we cannot agree. It is well and justly settled that one who has intercourse with a child under fourteen years of age is guilty of rape, even if she actually consents; and if the defendant bona fide believes, and has good grounds for belief, that she is past the age which establishes the crime: *People v. Ratz*, 115 Cal. 132. The same principle is uniformly applied in cases of abduction and of placing minors in houses of prostitution, where the fact, and not defendant's knowledge or belief, fixes

his responsibility. Not only does the due protection of society demand this, but he who engages in such enterprises is committing a moral wrong, for which there can be neither palliation nor excuse. The illegal motive is present, and that illegal motive becomes a criminal intent when the facts, at whose peril he acts, are shown to exist. The same principle is strictly applicable to the case at bar. Indeed, it may be said that there is even more reason for its invocation and use. It may happen that a female child under the age of fourteen may early mature and present the appearance of one much more advanced in years. But in such a case her undoer is not exculpated. It can scarcely happen that one seeking illicit intercourse with a woman of weakened intellect will not know that fact. If he indulges in niceties as to whether or not she be just so far ⁵⁸⁷ mentally infirm as to save him from criminal consequences, and so pursues his purpose, he does so at his peril.

The evidence of the people was sufficient to warrant the finding of the jury that the girl, by reason of mental unsoundness, was incapable of giving legal consent. It was shown that she had been feeble-minded since early childhood. The medical superintendent for the state home for feeble-minded testified that she was (at the time of the trial) an inmate of his institution and was feeble-minded. Objection was made to this evidence as bearing upon her condition six months after the alleged offense, and as not throwing light upon her condition at the time of the offense. A similar point is made upon the court's refusal to give an instruction embodying this objection. But, as the mental infirmity sought to be shown by the people was a long-standing one, evidence of its past, present, and continued existence was admissible as bearing upon her state of mind at the time of the occurrence.

The judgment and order appealed from are affirmed.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

RAPE—MENTAL INCAPACITY OF FEMALE—EFFECT OF.—The essential constituent of the crime of rape is that the act should be intended to be done with force, actual or constructive, and without the woman's consent, express or implied. If she be at the time unconscious, or in a state of stupefaction, the idea of force is necessarily involved in the wrongful act itself—the act of penetration. If she is idiotic or non compos, she is regarded as incapable of giving consent; but the mere fact that she is weak-minded does not disable

her from consenting to the act: *McQuirk v. State*, 84 Ala. 435; 5 Am. St. Rep. 381. Where the victim is incapable, through mental disorder, of giving consent, the crime is rape: *Extended note to Smith v. State*, 80 Am. Dec. 365; *State v. Atherton*, 50 Iowa, 189; 32 Am. Rep. 134.

RAPE.—On the general subject, see the monographic note to *Smith v. State*, 80 Am. Dec. 361-375.

DE GREAYER v. SUPERIOR COURT.

[117 CALIFORNIA, 640.]

GUARDIAN OR ADMINISTRATOR, RIGHT OF TO CUSTODY OF ASSETS.—An order of a court of probate that moneys of a decedent or of a ward be held by a deposit company and paid out only as authorized by the court is void, where the statute exacts security from guardians and administrators, and gives them a right to the exclusive possession and general care and management of the estates committed to their charge.

CERTIORARI.—An order of a court of probate depriving a guardian of the custody of moneys of his ward and directing that they be withdrawn from a bank in which they are on deposit only when authorized by the court, is in excess of its jurisdiction, and may, therefore, be vacated on certiorari.

Alex G. Eells, for the petitioner.

Timothy J. Lyons, for the respondent.

642 **VAN FLEET, J.** Certiorari to review an order of the superior court of the city and county of San Francisco, Department 9.

Petitioner is, by will of the father and appointment of the court, the general guardian of the person and estate of Harry Gardiner de Greayer, a minor, the estate being in process of administration in said superior court. Belonging to the estate is a certain large sum of money distributed to the ward from the estate of his father, which, at the time of distribution, was on deposit by petitioner, in his capacity as executor of the will of the father, in the California Safe Deposit and Trust Company. Upon the distribution of the fund, petitioner was required to and gave an additional bond as guardian in double the amount of the fund, and an order was then made that said money be transferred on the books of the safe deposit company to petitioner's account as guardian; but thereupon said court, of its own motion, and without other circumstance, made a further order that the said moneys "be held by said California Safe Deposit and Trust Company, subject to the order of this [said superior] court, and be paid out only as authorized by this court."

It is contended by petitioner that this last order constituted an infringement upon his rights as guardian, which was beyond the power of the court, and that the order is void.

It is obvious at a glance that the effect of the order is to deny to and deprive petitioner, as guardian, of the possession and control of such fund, and, to that extent, of the possession and control of the estate of his ward. That the law does not authorize such an interference with the possession and control of one standing in the relation of petitioner to the fund has, we think, been expressly determined in the very recent ⁶⁴³ case of *In re Welch*, 110 Cal. 605, 608, where, in considering an order of precisely similar import made in the estate of a deceased person, the court, speaking through Mr. Justice Temple, says: "I know of no law which authorizes a probate judge to direct an administrator where and how he shall keep the assets of an estate, and surely there ought to be no such law. The administrator is liable for their safety on his bond. If the court could lawfully take charge of them it would deprive interested parties of this security. If goods are lost, it may be a question whether they have been properly cared for. If they have been placed where the judge has directed, and then lost, he will have prejudiced the case before the trial. Administrators cannot be deprived of the actual custody of the assets of the estate by such an order."

Respondent expresses doubts as to the correctness of what is there said, even as applied to the office of administrator, but contends that in any event it has no bearing here because of "the vast difference at the common law between the functions of an administrator and those of a guardian."

But we are pointed to no essential difference in the nature of the trust, either at common law or under our statute, affecting the question here involved, or which would render impertinent the considerations suggested in *In re Welch*, 110 Cal. 605. Whatever the differences in his rights and duties in other respects, a general guardian at the common law, equally with an administrator or executor, was entitled to the exclusive possession, with the general care and management of the estate committed to his charge: *Woerner's American Law of Guardianship*, secs. 53, 55, 56, 61, 62; *Lee v. Lee*, 55 Ala. 590. And, indeed, in many other, if not most, respects there has always been great similarity between the powers and duties of a guardian in respect of the property of his ward, and an executor or administrator in

the management of the estate of a deceased person. "Both classes of functionaries," says Mr. Woerner, "are ⁶⁴⁴ treated in law in many respects like trustees holding a legal but not beneficial title to the property intrusted to their custody. Text-writers and courts find it convenient to include executors and administrators in discussing the powers, rights, duties, and liabilities of trustees; and guardians, notably guardians in socage, and testamentary guardians, were early recognized at common law and under the statute of Charles II as trustees, with not a bare authority, but an actual interest in their ward's estate": Woerner's American Law of Guardianship, sec. 53.

And what was true in those respects at the common law is not less true under our statute. In fact, by the express terms of the statute, the guardian is given the possession, care, and management of the estate of his ward: Civ. Code, secs. 236, 247, 249; Code Civ. Proc., secs. 1753, 1754, 1769, 1770.

And the powers there given and the duties imposed are such as in their essential nature are wholly at variance with the existence of the right in the court to take the custody and management of the estate out of the hands of the guardian into its own. Under these provisions, as it was at the common law, it is the guardian, and not the court, who is made responsible for the proper administration of the trust. He it is to whose custody the property of the ward is intrusted, and to whom the law and the ward alike look for its safe return. In the performance of his duties he is, it is true, in certain respects under the control and supervision of the court appointing him; but this right of supervision does not, under our code, nor did it at the common law, carry the power to interfere in any such manner with the custody and general management of the property of the ward—except, of course, for conduct authorizing suspension or removal.

In *Lord v. Hough*, 37 Cal. 657, 664, it is said, in discussing this power of the court, that, "While the court of chancery has the control and superintendency of all guardians, however appointed, yet it can no more interpose ⁶⁴⁵ in matters of guardianship without cause, than it can interpose without cause in other matters which are within its jurisdiction. Chancery will not interfere and remove a guardian who has been legally appointed, unless for misbehavior. The guardian appointed by either the common law or statute has a legal right to the trust, of which he cannot be deprived except for reasons in equity. The dis-

cretion of the chancellor, of which mention is frequently made in connection with his power of supervision and removal of guardians, is not an arbitrary or capricious, but a judicial, discretion, to be exercised, not in total disregard, but with due regard to all the legal rights of all concerned": See, also, *Lincoln v. Alexander*, 52 Cal. 482; 28 Am. Rep. 639.

Indeed, the right of custody and control of the property is even more essential to the full and proper discharge of a guardian's trust than to that of an administrator or executor, since the former is charged not alone with the safekeeping of the property of his ward, but with its judicious and proper investment. And it is primarily to his discretion, rather than that of the court, that this most important duty is committed—a duty to be performed under the direction and control of the court, but, after all, a duty confided by the law to the guardian, who is made responsible for its faithful performance: *Estate of Cardwell*, 55 Cal. 136, 141; *Woerner's American Law of Guardianship*, sec. 63.

It is quite apparent that, if the court can by such an order tie up the funds of an estate and deprive the guardian of its control, the latter may be thereby prevented from fulfilling one of the primary purposes of his trust. And in such an instance the ward might be left without redress for any loss resulting, since it is doubtful if the guardian could be held responsible for failing to perform a duty from which he was restrained by order of the court: *Estate of Welch*, 110 Cal. 605.

While respondent does not expressly claim that the order in question was made or intended as a direction ⁶⁴⁶ for the "investment" of the fund, he cites in support of the order the provisions of the code authorizing the court to direct and supervise the investment of the trust property, and particularly section 1792 of the Code of Civil Procedure. That section provides: "The court, on the application of the guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require."

In the first place, the recitals of the order negative the idea that it was intended as a direction for the investment of the money in pursuance of the authority given by the above section, since it states on its face that it is made in pursuance of a general rule theretofore adopted by the court providing for "the safekeeping" of the moneys of estates generally, and makes no reference to the subject of investment.

In the next place, if intended as a compliance with that section, it clearly transcends the power there given. Whether that provision contemplates an order for the investment of funds without notice to or application first made therefor by the guardian or other person interested in the estate, or whether, under any circumstances, it would authorize a direction for the deposit or keeping of the funds in the hands of an institution or individual specially chosen and designated by the court without the consent of the guardian, are questions which need not be here decided; for certain it is that the court cannot, for the purpose of investment more than another, deprive the guardian of the custody and control of the fund or the securities representing it. If money of the estate be invested, the guardian is still ⁶⁴⁷ entitled to its general care and custody, and that of the notes, bonds, mortgages, bank-books, or other security evidencing such investment, with the right and duty to preserve them, and to take such proper and necessary steps at any time to protect the interests of the ward therein as circumstances may demand. The order in question has the effect to deprive the guardian of this right, and to practically place the custody and control of the fund in the hands of the court exclusive of the guardian. Such an order is without doubt in excess of the power of the court, and void.

The order is annulled.

Harrison, J., and Beatty, C. J., concurred.

EXECUTORS AND ADMINISTRATORS—RIGHT TO CUSTODY OF ASSETS.—Under the laws of California, an administrator is vested with the right to the possession of the real estate of his intestate, as well as the personal, and his duties and liabilities in respect thereto are of the same general character: *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290. See, also, *Beckett v. Belover*, 7 Cal. 215; 68 Am. Dec. 237. An administrator de bonis non may maintain an action to recover the assets of the estate wherever they may be found: *Jelke v. Goldsmith*, 52 Ohio St. 499; 49 Am. St. Rep. 780.

GUARDIAN AND WARD—CUSTODY OF ESTATE.—The guardian of a minor's estate has an authority coupled with an interest, and

an act of the legislature empowering another to dispose of the estate is unconstitutional: *Lincoln v. Alexander*, 52 Cal. 482; 28 Am. Rep. 639.

CERTIORARI—PURPOSE AND SCOPE OF WRIT.—The office of certiorari extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the act complained of, and all questions of irregularity in the proceedings, that is, of the question whether the inferior tribunal has kept within the boundaries prescribed by the express terms of the statute law or well-settled principles of the common law: Monographic note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 80, on questions reviewable upon certiorari.

AM. ST. REP., Vol. LIX,—15

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

PICKETT v. STATE.

[99 GEORGIA, 12.]

ARREST AND SEARCH WITHOUT WARRANT.—Though an officer is given authority by statute, without warrant, to arrest for an offense committed in his presence, he has no right, upon suspicion, nor upon information derived from others, to arrest a citizen and search his person to ascertain whether he is carrying a concealed weapon in violation of law.

CRIMINAL LAW, OFFENSE COMMITTED IN THE PRESENCE OF AN OFFICER, WHAT IS NOT.—Though one has a concealed weapon on his person in violation of law, he cannot be regarded as committing an offense in the presence of an officer where his weapon is not seen, and could not be seen, by the latter except by search of his person.

CRIMINAL LAW—INSTRUCTION TO JURY, OMITTING QUESTION OF JUSTIFICATION.—Where the person sought to be arrested fired at the officer with a pistol, and was indicted for assault with intent to murder and, upon the trial, testimony was introduced to the effect that both parties fired, though it was an issue of fact as to who fired first, it was error to charge: "If you find it would be a case of murder had death ensued, you will find [the accused] guilty of shooting at another," such charge being erroneous in that it omitted altogether all question of justification on the part of the accused.

Indictment for assault with intent to murder a police officer. An arrest had been made by the officer of the defendant's brother, and some person told the officer that the defendant was armed. The officer then went to the defendant and claimed the right to search him. This right the defendant denied, but the officer insisted upon exercising it, and claimed that in so doing he discovered a pistol, after which an altercation followed, in which the defendant and the officer, it is claimed, shot at each other. The defendant, on the other hand, claimed that he did not have any

weapon on his person and did not do any shooting. On the trial the court charged the jury that if the defendant had been violating the laws of the state, and the officer had been informed of it, he had a right to arrest the defendant whether he had a warrant or not, and, after the arrest, had the right to search defendant and take such weapon from him as would be calculated to result in harm. The defendant, being convicted, appealed.

J. B. Conyers and Kontz & Conyers, for the plaintiff in error.

A. W. Fite, solicitor general, by A. S. Johnson, contra.

¹⁵ LUMPKIN, J. 1. While, under section 4723 of the code, an officer may, without a warrant, make an arrest for an offense committed in his presence, he has no authority, upon bare suspicion or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he is carrying a concealed weapon in violation of law. The constitution of this state expressly declares in the bill of rights that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated": Code, sec. 5008. If any search is unreasonable and obnoxious to our fundamental law, it is one of the kind with which we are now dealing. Even if the person arrested did in fact have a pistol concealed about his person, the fact not being discoverable without a search, the offense of thus carrying it was not, in legal contemplation, committed in the presence of the officer, and the latter violated a sacred constitutional right of the citizen in assuming to exercise a pretended authority to search his person in order to expose his suspected criminality.

2. It appears from the evidence that shots were exchanged between the officer and the accused, who was the person sought to be arrested and subjected to search. The latter was indicted and tried for assault with intent to murder. It was a contested issue of fact as to who fired the first shot. The court, in its charge, gave the instruction quoted in the third headnote, the error of which is obvious, for the reason that it eliminated altogether from consideration all question of justification on the part of the accused. The court, by this charge, assumed that the accused was inevitably guilty of some offense; whereas, under ¹⁶ the evidence as it appears in the record, this was a matter for the jury to determine.

Judgment reversed.

ARREST WITHOUT WARRANT.—An officer is justified in arresting one formally charged with crime, though it turns out that the person charged is innocent. If he makes an arrest for a felony without a warrant, although he has no personal knowledge, but acts upon information received from one whom he has reason to rely upon, and although it may turn out that the person charged is not guilty, or no felony in fact has been committed, yet he is justified: *Miller v. Smith*, 96 Mich. 347; 35 Am. St. Rep. 603. But an officer should use great care before assuming to arrest a person upon the information of another: *Note to Roberts v. State*, 55 Am. Dec. 104. And, to authorize an arrest without warrant for a breach of the peace the breach must be committed in the officer's presence: *People v. Johnson*, 86 Mich. 175; 24 Am. St. Rep. 116; *note to Commonwealth v. Wright*, 35 Am. St. Rep. 484. See *Diers v. Mallon*, 46 Neb. 121; 50 Am. St. Rep. 598.

ARREST—SEARCH OF PRISONER BY OFFICER.—A search of the person arrested is justifiable only as an incident to a lawful arrest; if the arrest be unlawful the search is unlawful, and is aggravated by the illegality of the arrest: *Cunningham v. Baker*, 104 Ala. 160; 53 Am. St. Rep. 27. A person while in custody on a criminal charge may be subjected to a personal search and examination against his will in order to discover upon him evidence of his criminality: *Rusher v. State*, 94 Ga. 363; 47 Am. St. Rep. 175, and *note*. See, also, *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23; *Olosson v. Morrison*, 47 N. H. 482; 93 Am. Dec. 459.

CRIMINAL LAW—CARRYING CONCEALED WEAPONS—SEARCH OF PRISONER—EVIDENCE.—On a trial for carrying concealed weapons, evidence of the discovery of a pistol found concealed upon the defendant's person by an officer, prior to his arrest, while making a forcible search of his person, is admissible against the defendant, although the search was unauthorized and unlawful: *Shields v. State*, 104 Ala. 35; 53 Am. St. Rep. 17.

DYER v. STATE.

[99 GEORGIA, 20.]

BREACH OF THE PEACE, TRUTH OF OPPROBRIOUS WORDS NOT A SUFFICIENT JUSTIFICATION.—In a prosecution for using abusive language tending to cause a breach of the peace, the fact that the words used were true does not constitute a sufficient provocation to justify their use. The only question is whether the language used was calculated to cause a breach of the peace. If so, it is not material whether it was true or false.

CRIMINAL LAW—BREACH OF THE PEACE—QUESTION FOR THE JURY.—It is not sufficient to justify the use of words calculated to lead to a breach of the peace that there was some provocation. The provocation must be sufficient, and whether it was so or not is a question for the jury.

INDICTMENT—VARIANCE.—Where words are the gist of an offense, the words themselves must be alleged, but only the substance need be proved. If some of the words are proved as alleged, and the words so proved amount to an indictable offense, it will be sufficient. A variance in a word, or in several words, where the sense is not in any degree changed, is not fatal.

Prosecution for a breach of the peace brought under section 4372 of the code of Georgia, which is as follows: "Any person who shall, without provocation, use to or of another, in his presence, opprobrious words, or abusive language tending to cause a breach of the peace, or who shall in like manner use obscene and vulgar language in the presence of a female, shall be guilty of a misdemeanor."

J. W. Harris, Jr., for the plaintiff in error.

A. W. Fite, solicitor general, by A. S. Johnson, contra.

²¹ SIMMONS, C. J. The plaintiff in error was tried upon a presentment charging him with using the following opprobrious words and abusive language tending to cause a breach of the peace, to and of Monroe Gillespie and in his presence: "You swore a God damned infernal lie, God damn you." The case came to this court upon exceptions to the overruling of his motion for a new trial.

1. It is complained that the trial judge erred in refusing to charge, as requested by the accused: "If Gillespie swore to a lie in a case against the defendant, you can consider that fact and determine whether that was provocation for telling Gillespie that he had sworn to a lie; and if you find that that was provocation for defendant's words, then you cannot convict this defendant." The court was right in refusing this request. The mere fact that opprobrious words tending to cause a breach of the peace are themselves true is not a legal provocation for their use. In other words, the fact that a man is a liar or a thief is not of itself alone a legal justification for telling him so. The gist of the defense is the use of language to or of another in his presence which is calculated to cause a breach of the ²² peace, and, if it is language of this character, it makes no difference whether it is true or false: Code, sec. 4372.

2. It is also complained that the court erred in refusing to charge: "Any provocation shown will justify opprobrious words. . . . If there was any provocation you must find [the accused] not guilty." The court did not err in refusing to give this in its charge. It is not the law that "any" provocation will justify the use of opprobrious words. A provocation may exist, and yet not be a sufficient provocation. It may be very slight and altogether inadequate to justify the use of language of an extremely in-

sulting and opprobrious character. There must be sufficient provocation, and whether it is sufficient or not is a question for the jury. To instruct them that "any" provocation is a justification for the use of the words is to take the question from them: See *Meaders v. State*, 96 Ga. 299.

3. The opprobrious words set out in the indictment were: "You swore a God damned infernal lie, God damn you." The person of whom these words were alleged to have been spoken testified: "Defendant said I had sworn a God damned infernal lie in court that day. He said, 'You swore a damned lie, a God damned infernal lie.'" The court charged: "The state is not obliged in this case to prove the exact words alleged in the bill of indictment. It is sufficient if the testimony shows that the defendant used the language charged, or the substance of the language charged, or substantially similar words to those charged, that is the substance of the words charged." The court also charged the state must prove enough of the words charged to amount to opprobrious words without provocation. It was complained that this was error, because the accused was not put on notice of any other words than those alleged in the indictment, and was not prepared to meet proof touching similar expressions. There is no merit in this exception. The language in proof was the ²³ language set out in the indictment, except that the indictment charged the use of the additional words, "God damn you." The accused was therefore put on notice of the language actually proven. The rule on this subject is stated in Wharton's Criminal Pleading and Practice, section 203, as follows: "Where words are of the gist of the offense, . . . the words themselves must be laid, but only the substance need be proved. . . . If some of the words be proved as laid, and the words so proved amount to an indictable offense, it will be sufficient." And in Clark's Criminal Procedure, page 334, it is said: "By the weight of authority, where spoken words are alleged in the indictment, as in an indictment for perjury, slander, profane cursing, . . . all that is necessary is to prove the words substantially as alleged, and to prove so much of them as is sufficient to make out the offense. A variance in a word, or in several words, where the sense is not in any degree changed, will not be fatal."

The evidence warranted the verdict, and there was no error in denying a new trial.

Judgment affirmed.

BREACH OF THE PEACE—WHAT CONSTITUTES—OPPROBRIOUS LANGUAGE.—A breach of the peace is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace: *People v. Johnson*, 88 Mich. 175; 24 Am. St. Rep. 116, and note. The use of profane, indecent, and abusive language by one toward another on a street, and in presence of others, is a breach of the peace: *Davis v. Burgess*, 54 Mich. 514; 52 Am. Rep. 828. See *State v. Archibald*, 59 Vt. 548; 59 Am. Rep. 755.

INDICTMENT—VARIANCE.—The acts constituting the offense must be proved as alleged in the indictment, although they are therein described with more minuteness than is necessary: *Commonwealth v. Magowan*, 1 Met. 308; 71 Am. Dec. 480; *State v. Newland*, 7 Iowa, 242; 71 Am. Dec. 444. Thus an indictment for stealing "Stephen" Daniel's dog will not sustain a conviction for stealing "Phillip" Daniel's dog: *Hensley v. Commonwealth*, 1 Bush, 11; 89 Am. Dec. 604; and an indictment for larceny of a certain number of "bottles of" liquor is not sustained by proof that the defendant feloniously drew liquor from casks into his own bottles which he had taken with him for the purpose: *Commonwealth v. Gavin*, 121 Mass. 54; 23 Am. Dec. 255.

LIBEL.—Whether or not a libel is justified is a question for the jury: *St. James' etc. Academy v. Gaiser*, 125 Mo. 517; 46 Am. St. Rep. 502; *Augusta Evening News v. Radford*, 91 Ga. 494; 44 Am. St. Rep. 53, and note.

JONES v. HOWARD.

[99 GEORGIA, 451.]

CONCURRENT LIENS, WHAT ARE NOT.—Where two liens are not established by the same act, it is not possible to apply to them the doctrine of concurrent liens simultaneously arising in consequence of their creation by the same instrument, and of equal dignity.

LIENS CANNOT BE REGARDED AS CONCURRENT because there is doubt or conflict of evidence as to which first attached. Hence, where a mortgage was executed and goods levied upon under a distress warrant for the payment of rent at about the same time, the witnesses differing as to which was first, a request to instruct the jury that if they conclude from the evidence that the lien of the distress warrant and the execution of the mortgage were contemporaneous, then they should prorate the fund, is properly refused. Any difference of time, however slight, in favor of either lien gives it precedence.

THE LEVY OF A WRIT IS NOT COMPLETE unless the property is actually seized or brought so far under subjection that the officer could exercise control over it. It is not sufficient that he, having the writ, appears at the store wherein the goods of the defendant are, and there announces to him that he has come to levy on everything in the house.

ATTORNEY AT LAW ACTING FOR BOTH PARTIES.—If an attorney at law acts for both parties in the preparation of a mortgage, he may act as agent of the mortgagee to accept the delivery of the mortgage.

NOTARY PUBLIC—ATTORNEY OF INTERESTED PARTY.—The attorney at law of a mortgagee is not incompetent as a notary public to attest the execution of the mortgage.

J. M. Moon and J. W. Harris, Jr., for the plaintiff in error.

J. M. Neel, contra.

⁴⁵² ATKINSON, J. The questions in this case arose upon a rule against the sheriff for money realized by him from the sale of property levied on under a distress warrant. The contest was between the lien of a distress warrant held by the plaintiff in error, and the lien of a mortgage executed by the defendant in the distress warrant upon the property levied on and sold under the distress warrant. It appears from the record that, upon the day that the distress warrant was issued, the defendant in that warrant, one White, instructed A. M. Foute, an attorney at law, to draw a mortgage upon the property afterward levied upon by the distress warrant to secure the payment of a certain indebtedness which he (White) owed to Howard, the defendant in error. Thereupon Foute proceeded to the place of business of Howard, told him of White's instructions, asked for and received from him the promissory note for the purpose of securing which the mortgage was to be executed, and then went to the store of White for the purpose of having the mortgage signed. Foute testified (and his testimony upon that point is corroborated by that of several other witnesses) that just upon the instant of his attesting the mortgage as a notary public, the officer charged with executing the distress warrant entered the building; that at the time the officer entered the building the mortgage had been signed by the maker and by one subscribing witness, but, as to whether it had been in fact signed by him as a subscribing witness in his official character as notary public, he did not remember accurately, though such was his best recollection; that as the sheriff entered and spoke to Mr. White, he folded up the paper and stepped out of the door, going directly to the office of the clerk of the superior court, where he delivered it to the clerk for record; that he had not been employed by Howard, the mortgagee, to take the ⁴⁵³ mortgage, but in procuring it as security for the payment of the debt he considered himself as representing Howard; that Howard gave him no directions as to having the mortgage filed, but that he knew this was necessary, and he did it upon his own motion. He further testified that, at the time White came to see him about preparing the mortgage, White stated to him that he expected Jones, the plaintiff in the distress warrant, to close him up under that proceeding, and that he was desirous of securing Howard bo-

fore the distress warrant was levied; that no sheriff was in the store at the time he arrived there, and no one except Mr. Charles White and his brother, Mr. T. W. White, was in there; that as he walked in, he said to Mr. White, the mortgagor, "I have the mortgage ready, Mr. White"; that White stepped around behind the counter or desk, and he immediately signed it; that Warren White, his brother, was standing there, and witness asked him to sign it also. He did so, and then witness signed it as notary public. Just as the signing was through, Mr. Franklin (the sheriff) stepped in. When he stepped in, the mortgage had been signed by Mr. White and T. W. White, and he witnessed it. As to the circumstances attendant upon the execution of the mortgage, this witness was corroborated by others whom he stated to have been present. Franklin, the sheriff, sworn on behalf of the plaintiff in the distress warrant, testified that he was the officer who levied the distress warrant; that he saw C. H. White when he first entered, told him at once that he had a warrant for rent, and had to levy on everything in his house. White said something about being busy then. Witness passed right on through the house to the back door, and White in the rear of the house placed his hands on some goods, and shut the back door, then went to the side door and tried to shut it, then went to the front door to shut it, and after he had shut the side door, and was going to the front door, saw A. M. Foute leave the place. When witness first got to the ⁴⁵⁴ store, saw A. M. Foute; he was standing at the desk of C. H. White, on his left hand side as you go in, with a pen in his hand; saw T. W. White, one of the witnesses to the mortgage, go around toward the desk where Foute was standing. C. H. White was standing in front of the desk when witness first entered. Witness said no more to White about levying the warrant. "Levied it when he first went in, and told White he had to levy on all in the house." Is positive that Foute was standing at the desk with pen in his hand when he first entered the house. Then went to an attorney's office and prepared the written levy which was in evidence. The jury found in favor of the mortgagee. A motion for new trial was made upon the general grounds that the verdict was contrary to law, evidence, etc., and that the court committed certain errors upon the trial, which we will hereafter consider.

1. During the course of the trial, the court was requested in writing to charge the jury: "If the jury conclude from the evidence that the levy of the distress warrant and the execution of the mortgage were simultaneous, then they should prorate the

fund." This request was refused. There was a conflict of evidence as to the exact point of time when the levy was made, and the evidence was equally conflicting as to the exact point of time at which the lien of the mortgage attached. The two liens were not established by the same act, and it is therefore impossible to apply to this case the doctrine of those cases which hold that concurrent liens simultaneously arising, in consequence of their creation by the same instrument, are of equal dignity, and are therefore entitled to equal rank in the distribution of a fund; nor can the doctrine that judgments bearing equal date, each having an equal lien upon the property of the defendant, shall be entitled to prorate in the distribution of a fund, apply. In the latter class of cases, the liens of the judgments are established by fixed rules of law, and though they may be ⁴⁵⁵ rendered by different courts, or in the same court upon different days, yet their liens may be, in law, concurrent, because attaching at the same time. Our code provides, in cases of judgments, that the liens of judgments rendered at the same term of court are of equal dignity, and therefore, while in point of time of rendition they may not be simultaneous, they are treated as having been rendered at the same time when the question of their respective liens is under consideration. Not so, however, with a case where the lien of the judgment or the lien of the mortgage is referable to the independent act of two private agencies respectively employed in their creation. It is impossible for each of the several acts necessary to the creation of the lien to be accomplished upon the same instant of time in such manner as to render them exactly simultaneous. Either the lien of the distress warrant or the lien of the mortgage first attached, and was, as a consequence, superior to the other. They could not attach at the same time in the sense necessary to make them concurrent liens. The lien of the distress warrant attached upon the instant of its levy. The lien of the mortgage attached upon the instant of its execution. The liens of the respective instruments were referable in the one case to the fact of levy, and in the other to the fact of execution. Any difference of time in favor of one or the other would suffice to give that lien the preference. The conflict in the evidence is as to which lien first attached. That one attached before the other is clear under the evidence. Just which one attached first is the question concerning which the doubt arises. There was no evidence upon which the theory that the two liens attached simultaneously could be based; and therefore the court committed no error in refusing

the request above referred to, which might have had the effect, if delivered, to produce a compromise verdict, which would be manifestly illegal, in taking from the one person and giving to another that to which he was not entitled. The ⁴⁵⁶ court properly referred to the jury directly the question as to which was the prior lien in point of time, and properly refused the request.

2. The court was likewise requested to charge the jury: "The levy was complete when sheriff with distress warrant appeared and announced to the defendant in the warrant that he had come to levy on everything in the house, that then everything in the house was in the custody and possession of the sheriff." This request was refused, and upon its refusal error is assigned. To the completion of a levy, seizure, either actual or constructive, is absolutely indispensable. Actual seizure is accomplished by a man-cupation of the thing intended to be seized. A constructive seizure is accomplished by the actual reduction by the officer of the property intended to be seized to his own control. He must have brought such property so far under his subjection that he could exercise control over it. He must exercise or assume to exercise dominion by virtue of his writ. He must do some act for which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ. For a full discussion of the question of what acts are necessary and sufficient to constitute a completed levy, see *Corniff v. Cook*, 95 Ga. 61; 51 Am. St. Rep. 55. Seizure, actual or constructive, and not the mere declaration of an intent to seize, is the final test of the completion of a levy. The request which was refused, and of which complaint is made, makes the mere utterance of an oral declaration of an intent to levy the equivalent of an actual seizure. Suppose the sheriff had entered, and, in the language of the request, announced to the defendant in the warrant "that he had come to levy on everything in the house," and had done no act beyond that, not even exhibiting the writ under which he professed to act, could it be held that the officer, by this mere verbal declaration, had so far deprived the defendant of the possession of his property as to support an action against him ⁴⁵⁷ for a trespass? To ask the question, it seems to us, is to answer it in the negative; and when the court refused to charge that such an announcement was the equivalent of a seizure of the property so as to fix upon it the lien of a distress warrant, no error was committed.

3, 4. Error was assigned upon the admission of the mortgage in evidence, over the movant's objection that Foute, the attesting notary public of the mortgage and upon the strength of whose

attestation it was admitted to record, was in the same transaction the attorney at law of the mortgagee, and was disqualified by said agency from acting as notary public in its attestation. Error was likewise assigned upon a charge of the court, which was as follows: "Well, you look to the evidence and see from it first in what capacity did Foute act in drawing that mortgage; did he act solely as agent for White, or was he, by the circumstances, in any part of the time acting as agent and attorney for both parties in drawing that mortgage and executing it, witnessing it and recording it, and putting it upon record? If you find that he was acting for both parties and White signed it, and it was witnessed and delivered to Foute, and he acting in that capacity, then it would constitute a valid mortgage from the time of its actual delivery to Foute, and it would be immaterial as to whether it was filed with the clerk for record or not in that view of the case."

We will consider these two assignments of error in their inverse order. It will be noted that this was a contest between a mortgage duly recorded and a lien arising upon a levy of a distress warrant. It was a contest between a lien acquired by contract and a lien imposed by law, and in the case of *Donovan v. Simmons*, 96 Ga. 340, it was held that the registry act of 1889 (Acts 1889, p. 106), which provides when transfers and liens shall take effect as against third persons, has no application to a case of the character now under consideration. The question is ⁴⁵⁸ whether a delivery to Foute and filing of the mortgage by him can be treated as a good delivery to the mortgagee. We think, under the evidence in this case, that Foute, in obtaining the mortgage and in effectuating the security, was the agent of the mortgagee. That he was so treated by the mortgagor is not open to question, for the mortgage was delivered by the mortgagor to Foute with the express intent of having him effectuate the lien. We know of no reason why he could not lawfully be the agent of both parties for this purpose. The agency did not involve the execution of the mortgage, but the mere acceptance of it upon the part of the person intended to be benefited by its execution. When Howard delivered to Foute the note intended to be secured, and with the purpose that he should obtain from White the mortgage which the parties then had in contemplation, from this fact alone a power to receive it for Howard might be well implied. We think, therefore, the court properly charged the law bearing upon this question.

The objection to the mortgage upon the ground that Foute, being the attorney at law of the mortgagee, was not competent, in

his official capacity as notary public, to attest its execution, we think without merit. It was held in the case of *Sloss v. Southern etc. Assn.*, 97 Ga. 401, that: "The attestation of a deed by an attorney at law, as notary public, who represented both the grantor and the grantee in the negotiations leading up to the execution of the instrument, does not render the deed invalid, and upon such attestation such deed may be lawfully admitted to record without further probate." And for analogous cases see *Wardlaw v. Mayer*, 77 Ga. 620; *Welsh v. Lewis*, 71 Ga. 387; *Conley v. Campbell etc. Mfg. Co.*, 78 Ga. 569. The case of *Nichols v. Hampton*, 46 Ga. 253, relied upon as holding a contrary doctrine, is not in point. In that case the attorney at law took an affidavit of his client for probate of a mortgage, ⁴⁵⁹ which, under section 408 of the code, he was prohibited from doing. There is no similarity between the questions made in that case and the question made here, but in the case of *Welsh v. Lewis*, 71 Ga. 387, above cited, this court ruled, referring to the case of *Nichols v. Hampton*, 46 Ga. 253, that the doctrine of that case rests upon the special statute, and will not be extended beyond its provisions by implication.

5. Upon a careful examination of the evidence in this case, we find that it was sufficient to support the verdict, and accordingly the court did not err in refusing a new trial.

Judgment affirmed.

LIENS—PRIORITY BETWEEN.—As between lienors whose equities are equal, the first in point of time takes precedence: *Booth v. Bunce*, 33 N. Y. 139; 88 Am. Dec. 372. The common law, in the absence of statutory regulation, establishes liens in the order of priority of their acquisition the first in order of time standing first in order of rank: *Voorhis v. Westervelt*, 48 N. J. Eq. 642; 3 Am. St. Rep. 815.

ATTACHMENT—WHAT IS A VALID LEVY.—To constitute a valid levy of an attachment, the officer levying it must take actual possession of the property attached as far as under the circumstances practicable. He must put himself in position to, and must in fact, assert and enforce a dominion over the property adverse to, and exclusive of, the attachment debtor, and such property must be in his substantial presence: *Jones Lumber etc. Co. v. Faris*, 6 S. Dak. 112; 55 Am. St. Rep. 814, and note. See note to *Corniff v. Cook*, 51 Am. St. Rep. 61.

ATTORNEY AND CLIENT.—ADVERSE INTERESTS, to be amicably adjusted, may be represented by the same counsel, though the cases in which this may be done are exceptional, and never entirely free from danger of conflicting duties. Thus the same attorney may represent both borrower and lender, upon mortgage or similar security, upon a mutual understanding between the parties, although the former only is expected to pay the fees: *Lawall v. Groman*, 180 Pa. St. 532; 57 Am. St. Rep. 662, and note.

NOTARIES PUBLIC—ATTORNEY OF INTERESTED PARTY.—It seems that where the notary is a party in interest he is disqual-

ified to take the acknowledgment to any writing: Extended note to Wilkowski v. Halle, 95 Am. Dec. 378. A notary public who is an attorney at law is not authorized to take the affidavit and bond of his client and issue the attachment in a case where he is employed: Wilkowski v. Halle, 37 Ga. 678; 95 Am. Dec. 374.

TAYLOR v. GEORGIA MARBLE COMPANY.

[99 GEORGIA, 512.]

CORPORATIONS, EMPLOYEES OF ARE NOT ALL FELLOW-SERVANTS.—While, in a loose, general sense, all agents and servants of a corporation, without reference to rank or dignity, are common employes, they are not all fellow-servants in the sense which relieves the corporation from liability for the negligence of one resulting in injury to another.

MASTER AND SERVANT, VICE-PRINCIPAL, WHO IS.—Where a master delegates to one of his employes such authority as subjects the will and discretion of all other employes in and about a particular business to the direction and control of the person to whom that authority is delegated, he will be said to be a vice-principal, and to stand in the relation of the master himself. His negligence may, therefore, be imputed to the master.

MASTER AND SERVANT, VICE-PRINCIPAL—RAILWAY CORPORATIONS.—If an engineer in the employ of a railway corporation has the sole charge, control, and management of a train and the brakemen thereon, so that the latter are under the duty of obeying his orders, they are not fellow-servants. The engineer is a vice-principal, and a brakeman may recover of the corporation for injuries resulting to him from the negligence of such engineer in running cars together which the brakeman was attempting to couple and without waiting for the usual signal from the brakeman.

Action to recover from the defendant acting as a railway corporation, though without a charter, for injuries alleged to have been received by the plaintiff while in the defendant's employ, through the negligence of its engineer. A part of the duties of plaintiff consisted in the coupling of cars. The train, including the plaintiff as one of the trainmen, was in the sole charge of an engineer employed by the defendant. During the time the plaintiff had been acting as car-coupler he had been under the control of the engineer McHan, and it was the custom when the plaintiff passed in between cars for the engineer to slow up the train and wait for a signal from the brakeman to move after the train and car came together before the engineer caused the train to run any farther. In the performance of his duties, and at the direction of the engineer, the plaintiff, after a train had passed to a sidetrack, went between a car and an approaching train for the purpose of coupling them together, believing that the engineer would adopt the usual precaution of slowing up the train as it approached the

car. The engineer, it was alleged, though he knew of the peril of the plaintiff, ran the train at unusual and unlawful speed against the car, as a result of which the plaintiff was unable to withdraw himself, and his hand and arm were caught between the car and train and broken and mangled. The engineer, it was further alleged, after plaintiff had been so caught and while he was so held, negligently and carelessly ran the train and car for a considerable distance along the track, whereby the plaintiff suffered further injuries. It appeared that on the occasion in question the engineer's real object was not to have the car and train coupled together, but was to kick cars on the sidetrack, but of this he did not notify plaintiff, and plaintiff supposed it was his duty to carry out his orders by attempting to effect the coupling. The engineer employed all the hands on the road. To a complaint setting forth substantially these facts, a demurrer was interposed by which it was claimed that the declaration was insufficient, in failing to show that the plaintiff made any effort to avoid the injury when he discovered that the train was approaching him, and that it did not appear that the plaintiff's injury could not have been avoided by the exercise of ordinary care. This demurrer was sustained, and the plaintiff appealed.

H. H. Perry and W. T. Day, for the plaintiff.

Clay & Blair and John Henley, for the defendant.

517 ATKINSON, J. 1. The liability of the defendant in the present case is referable to the general law bearing upon the relation of master and servant; for, while the defendant was engaged in running and operating a railway train, it was a mere private institution, not operated under and by virtue of any franchise granted by the state, and therefore does not fall within the provisions of our code imposing liability upon railroad companies in favor of an employé injured, when without fault himself, in consequence of the negligence of a fellow-servant. The sole question for determination is, whether the person whose alleged negligence caused the injury was, in a legal sense, a fellow-servant with the person injured, and engaged as such in and about the common employment of the master.

Corporations act only by and through their agents; and while in the loose general sense all agents and servants of a corporation, without reference to rank or dignity, are coemployés, they are not fellow-servants in the sense which relieves the corporation from liability for the negligent act of one resulting in injury to

another, where the person whose negligence caused the injury occupies the position of quasi master as to the person injured: *Atlanta Cotton Factory v. Speer*, 69 Ga. 137; 47 Am. Rep. 750. Such a doctrine would result in defeating, in every instance, a right of recovery in favor of an employé of a corporation, injured in consequence of the negligence of another employé. Where the master delegates to one of his employés such authority as subjects the will and discretion of all other employés, engaged in and about the particular business, to the direction and control of the person to whom that authority is delegated, such person may be well said to be a vice-principal, and to stand in the relation of the master himself. ⁵¹⁸ The negligence of such person may properly be imputed to the master as his act, and particularly is this true with respect to the employés of corporations; for if the master be not present in the person to whom it has delegated this authority, it is not and can never be present at all. It appears in the present case, according to the allegations in the declaration, that the engineer through whose negligence the injuries were alleged to have been sustained had, by direction of the common master, the corporation, sole charge and entire control and management of the train, and of the plaintiff in his capacity as brakeman and coupler thereon. It was alleged that the plaintiff was a subordinate employé under the direction and control of the engineer, and that it was his duty to obey the orders of the engineer. The declaration alleges that he was employed by the engineer. These allegations being admitted by the demurrer to be true, the engineer, while a coemployé, was not in a legal sense a fellow-servant with the plaintiff. The master had deputed to the engineer authority over those who were subordinate to him, and the negligence of the person exercising such authority was the negligence of the master itself: See *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377.

2. The declaration in all other respects was sufficient, and the relation existing between the person injured, and the one through whose negligence the injuries were alleged to have resulted, not having been of such a character as to defeat a recovery upon the ground that they were fellow-servants, the demurrer to the declaration should have been overruled.

Judgment reversed.

MASTER AND SERVANT—VICE-PRINCIPAL—WHO IS.—A person employed by a master and given power to superintend, control, and direct other employés engaged in the performance of certain work for the master, is, as to the men under him, a vice-principal, whatever he may be called: *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark.

66; 41 Am. St. Rep. 85, and note. See, also, *Ellis v. National City etc. Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 290.

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE.—Fellow-servants are those who are so far working together as to be practically co-operating, and who have an opportunity to control or influence the conduct of, and who have no superiority over, one another: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436; 52 Am. St. Rep. 896, and note. A conductor of a railway train is not a fellow-servant of a fireman thereon, if the latter is under the control of the former: *Railroad v. Spence*, 93 Tenn. 173; 42 Am. St. Rep. 907, and note. But see *Norfolk etc. R. R. Co. v. Hoover*, 79 Md. 253; 47 Am. St. Rep. 882, and note.

STRICKLAND v. VANCE.

[99 GEORGIA, 581.]

MARRIED WOMEN—DEFENSE OF SURETYSHIP.—If a husband and wife execute their joint note apparently as makers and without disclosing any suretyship, she cannot assert the defense of suretyship as against any person acquiring the note before maturity without notice that she was not a principal.

NOTICE TO AGENT, WHEN IMPUTED TO PRINCIPAL—HUSBAND AND WIFE.—If a person having a note and mortgage executed by a husband and wife offers them for sale, and he to whom they were offered declines to purchase them, stating that he would purchase a note and mortgage made directly to himself by the same persons and upon the same property, and thereupon the person thus offering to sell undertakes to procure, and does procure, another note and mortgage as suggested, he in so procuring them must be regarded as the agent of the intending purchaser, and the latter is therefore chargeable with notice of all facts known to such agent. Hence the wife may assert, as against him, the defense that she was a surety merely, if the fact of her suretyship was known to such agent.

W. H. Dabney and T. W. Skelly, for the plaintiff in error.

McCutchen & Shumate, contra.

531 **LUMPKIN, J.** In a transaction between Vance and his wife on the one side, and Anderson on the other, the particulars of which are immaterial, the Vances executed and delivered to Anderson their negotiable promissory note, signed as joint 532 makers and not disclosing the fact of suretyship on the part of the wife. This note was secured by a mortgage on her property. Anderson offered the note for sale, before its maturity, to Strickland, who declined to purchase it, but stated to Anderson that if he would procure an exactly similar note payable to Strickland himself, and secured by a mortgage in the latter's favor covering the same property, he would "buy" the papers. Anderson did procure such a note and mortgage, and delivered the same to Strickland. The original note and mortgage were canceled. Sub-

sequently, Mrs. Vance, after satisfying the note and mortgage held by Strickland, brought her action against him for the recovery of money and property belonging to her separate estate with which she had parted in settling with him.

Under the facts as found by the jury, Mrs. Vance's true relation to the note was that of a surety only, and the sole question presented for our determination is this: Assuming that Strickland took the note and mortgage delivered to him by Anderson before maturity and in ignorance of the wife's suretyship, could he legally hold her liable thereon? If he had in good faith purchased the note and mortgage originally offered him by Anderson, before the note became due and without notice that Mrs. Vance was a surety only, it is quite certain that she could not, as against Strickland, have set up the defense of nonliability on the ground that this was a contract of suretyship entered into by a married woman, and therefore void: *Howard v. Simpkins*, 70 Ga. 322; *Strauss v. Friend*, 73 Ga. 782. Is the case altered because Strickland, through the intervention of Anderson, took a note signed by Vance and his wife apparently as joint principals, payable to the order of Strickland himself, and accepted by him without actual knowledge of the fact that Mrs. Vance was a surety only? If Strickland had any claim at all against Mrs. Vance, it is because of the fact that he was a party to a contract between himself and her. He could become a party to a contract ⁵³³ evidenced by a promissory note in which he was named as payee, and signed by a man and his wife jointly, in only two ways, viz., one, by personally conducting the negotiations and procuring the note to be executed; and the other, by doing these same things through the medium of an agent. There is no contention that Strickland had any direct dealings or negotiations with the Vances; but it is certain that he became possessed of their obligation to pay money directly to him, or his order. This was brought about by his authorizing Anderson to procure for him the note and mortgage in question. Under the facts disclosed by the record, Anderson was in no sense the agent of the Vances to procure for them a loan from Strickland; and therefore they were not bound by anything which Anderson may have represented to Strickland. The inevitable conclusion from all the facts is, that Anderson acted as the agent of Strickland in procuring for him the last note and mortgage from the Vances. This being so, Strickland was beyond question chargeable with notice of all the facts within the knowledge of his agent, Anderson; and as there was evidence to warrant the jury in finding that Ander-

son knew the fact that Mrs. Vance's relation to the note he procured for Strickland was that of a surety only, knowledge of this fact is, in law, imputable to Strickland himself.

Properly viewed in the light of the undisputed facts, Strickland did not "buy" the note from Anderson; for, as has been shown, the latter was really Strickland's agent in procuring it. The charge of the court complained of was based upon this latter theory, and was therefore not erroneous. No material error of law was committed on the trial, and the verdict as rendered will not be disturbed.

Judgment affirmed.

MARRIED WOMEN—DEFENSE OF SURETYSHIP.—If a wife makes her note to her husband's order and delivers it to him to procure its discount, and with the proceeds pay his own debt, and the husband applies for its discount at a bank having notice that the note is without consideration and for discount, but not that the proceeds are to be applied for the husband's benefit, and the bank discounts it by check to the wife's order, which the wife indorses and delivers to her husband, knowing that it is the proceeds of the discount of her note, she is estopped from setting up against the bank that she is a mere surety on the note: *Monographic note to Trimble v. State*, 57 Am. St. Rep. 178. See extended note to *Grafton Bank v. Kent*, 17 Am. Dec. 416-419, as to when an apparent principal may show himself to be a surety.

AGENCY—NOTICE TO AGENT—WHEN NOTICE TO PRINCIPAL.—Notice or knowledge coming to an employé in the line of his service is notice to the principal: *Higman v. Camody*, 112 Ala. 257; 57 Am. St. Rep. 33, and note; *Enos v. St. Paul etc. Ins. Co.*, 4 S. Dak. 639; 46 Am. St. Rep. 796.

LEE v. SAVANNAH GUANO COMPANY.

[99 GEORGIA, 572.]

HUSBAND AND WIFE, HIS AGREEMENT TO PAY FOR HER SERVICES.—An agreement between a husband and wife that they will dispense with servants and that she will perform with her own hands the ordinary household duties, for which he will pay her one hundred dollars per annum, is without consideration, and therefore cannot, as against his creditors, support a conveyance made by him to her in satisfaction of moneys due by the terms of such agreement. Notwithstanding the statutes enlarging the rights of married women, they remain subject to the duty of assuming the ordinary burdens of wifehood.

L. W. Lindsey, and Estes & Jones, for the plaintiff in error.

F. Chambers, contra.

573 LUMPKIN, J. An execution in favor of the Savannah Guano Company, against a partnership composed of Lee and two others, was levied upon certain land as the property of Lee, which

was claimed by his wife. The property was found subject, and the claimant complains here of the overruling of her motion for a new trial. Although it contains numerous grounds, the case, upon its merits, involves a single question, viz., that indicated in the first headnote. The record discloses that when Mr. and Mrs. Lee married, they owned no property, and were necessarily dependent upon their own labor for a support. Realizing their situation, and being very properly desirous of bettering their condition in life by the accumulation of property, they considered and discussed between themselves the question of dispensing with hired servants, and doing their own work, each to bear a fair share of the burden common to both. It was obviously contemplated that the husband should labor to procure for them the necessities of life, and that she should keep the household and its affairs in order. This is exactly what people in their circumstances ought to do, and their conduct was altogether praiseworthy. It further appears that they entered into an agreement by the terms of which Mr. Lee was to pay Mrs. Lee one hundred dollars per annum in consideration of her consent to dispense with servants and her undertaking to perform with her own hands the ordinary household duties devolving upon a wife in her position. There was nothing wrong about this agreement, and if Mr. Lee had been able to pay her the stipulated sum per annum, and at the same time pay his debts, there would have been no difficulty about the matter. We cannot, however, bring ourselves to the conclusion that an agreement of this kind can be made effectual as against creditors ⁵⁷⁴ of the husband. Mr. Lee failed to make the annual payments to his wife as agreed; and when his alleged indebtedness to her had so accumulated as to amount to a considerable sum, he conveyed to her the land now in dispute in settlement and full satisfaction of her entire claim. This conveyance was made before the plaintiff in execution had obtained judgment against Lee upon a debt contracted by the latter prior to the settlement with his wife above mentioned.

Under the facts recited, we do not think Mrs. Lee can maintain her claim to the land in controversy. Notwithstanding the passage of the married woman's law of 1866, the wife still owes to the husband the performance of those common-law duties, and the rendering of those services, which are appropriate to their surroundings and circumstances. If he labors in the field, in the workshop, or elsewhere, for her support, as is his legal duty, she cannot charge him for cooking his meals, making or mending his garments, sweeping the floors of his house, milking the cow, or

for other services of a like kind. Their duties are correlative, the performance of hers being no less obligatory than the performance of his. The husband is not legally bound to support his wife in luxurious idleness. If she refuses to perform her obligations, she forfeits all right to demand of him a support. The courts uniformly protect the husband in the assertion of his lawful right to receive the benefit of his wife's services. Indeed, it is only upon the theory that the services of the wife belong absolutely to her husband, that the law allows him to recover damages for torts committed upon her, by reason of which he is deprived of those services. If a husband without means is willing to take upon himself all the burdens, or if, because of the possession of adequate means, he is able to relieve his wife from all forms of drudgery, it is in the first instance sometimes commendable, and in the latter always ⁵⁷⁵ proper, for him to do so; but the wife cannot demand such an exemption as a matter of strict legal right.

It must be borne in mind that we are not now dealing with the question of the husband's appropriation of money made by his wife as earnings from work or labor performed in spheres entirely outside of her household duties and obligations. Such earnings are oftentimes exclusively her own; certainly so, when her husband expressly consents to her engaging in the occupation or business from which they are realized. The present case is altogether of a different order. In reaping the benefits of his wife's services in conducting in person her household affairs, Mr. Lee gained nothing to which he was not, independently of the agreement between them, entitled as a matter of absolute right. This is none the less true, though the services she rendered may have been prompted by affection and a wifely devotion which made her willing to save him the expense of hiring servants, which he would have been willing to incur had she so desired. It follows that his alleged agreement with her did not amount to a contract which, in any legal sense, was based upon a valuable consideration. In cold, hard law—which we are obliged to enforce—it was only a nudum pactum. The deed made in pursuance of this agreement rested upon no better foundation than the alleged contract itself, and was therefore purely voluntary. We are thoroughly satisfied that the rights of a judgment creditor cannot be defeated by such a conveyance.

Any other conclusion would tend to a disregard and neglect of those mutual obligations existing between married persons of limited means, the observance of which contributes so largely toward

making the honest laboring people of this country the bulwarks of its prosperity.

Judgment affirmed.

HUSBAND AND WIFE—HIS AGREEMENT TO PAY FOR HER SERVICES.—As to the validity of contracts between husband and wife stipulating for the payment by him to her of a stated sum in consideration of her proper performance of her marital duties, see monographic note to *Michigan etc. Co. v. Chapin*, 58 Am. St. Rep. 492.

POTTLE v. LOWE.

[99 GEORGIA, 576.]

USURY. RETAINING BENEFIT OF COMMISSIONS.—If a lender receives the full amount of interest which the law permits, and his agent exacts a commission of the borrower for securing the loan, and divides it with the lender, the transaction is usurious, and a trust deed given to secure the loan is, by the laws of Georgia, void at the option of the borrower; his title cannot be divested by the exercise of the power of sale given in such deed.

A POWER CANNOT BE VALID if the purpose for which it is created is not legal. Hence, if contained in a trust deed made to secure a loan, infected with usury, it cannot authorize a sale in pursuance of the terms of such deed.

Hardeman, Davis & Turner, and Richard Johnson, for the plaintiff in error.

Dessau, Bartlett & Ellis, R. V. Hardeman, and Robert Hodges, contra.

576 LUMPKIN, J. This was an action of ejectment on the demises of Lowe and Small, the real defendant to which was Mrs. Pottle who was in the actual possession of the premises. It appears from the record that she and her mother, Mrs. Hamilton, who has since died, borrowed money from the Georgia Loan and Trust Company and gave notes for the same, secured by a deed, executed under section 1969 et seq. of the code, conveying to the lender the land in dispute. This deed contained a power of sale authorizing the loan company 577 to sell the land in case of any default in paying the interest subsequently falling due upon the notes, and also a further stipulation that, upon such default, the principal of the notes should, at the option of the grantee, become due and payable at once. Default having been made, the loan company undertook to exercise this power of sale, and, in pursuance thereof, conveyed the land to the plaintiffs in the present action, who claim to have thus acquired the legal title. The defense relied on by Mrs. Pottle was, that the security deed taken by the loan company was absolutely void, because given to secure a debt

infected with usury; that, consequently, the power of sale incorporated in the deed was likewise invalid and inoperative; and that the sale made by virtue thereof was a mere nullity, and could not operate to pass title into the plaintiffs.

The rate of interest expressed in the notes was eight per cent, which is the maximum legal rate in this state. O. A. Coleman was the general manager of the Georgia Loan & Trust Company. According to his testimony, the company never parted with the full amount for which the notes of Mrs. Pottle and her mother were given, but, acting in its behalf, he retained a part of the money as commissions. His exact expression was: "I retained the usual commissions for the Georgia Loan & Trust Co." Again, L. J. Anderson, who represented the applicants for the loan, testified that from the fifteen hundred dollars for which the notes were given, one hundred and eighty dollars was deducted as commissions for negotiating said loan; ninety dollars was retained by myself, and ninety dollars by the Georgia Loan & Trust Co." There was nothing to the contrary of this evidence; and therefore the fact was established beyond doubt or controversy that the lender actually received, in addition to the eight per cent reserved in the notes, a bonus in the shape of commissions exacted from the borrower through Anderson. Possession of the land was never surrendered to the loan company, but remained in Mrs. Pottle; and the plaintiffs' alleged right ⁵⁷⁸ to evict her is based solely upon the two deeds above mentioned. There was a verdict in their favor, and the material questions presented for review will now be briefly discussed.

1. It surely cannot be doubted that the notes were infected with usury. The lender received for the use of its money more than eight per cent; and, if this does not constitute usury, it would be difficult to conceive of a usurious contract. It makes not a particle of difference whether the commissions were charged by an agent of the loan company, or of the borrower, if the lender in point of fact actually received a portion of the same. From Coleman's testimony, it seems clear that in the very inception of this loan, the company contemplated exacting commissions in addition to the interest charged; and that its intention to do so was fully carried out, is shown by the testimony of Anderson. In *McLean v. Camak*, 97 Ga. 804, it was shown that if the agent of the lender, without his knowledge or consent, exacted commissions from the borrower, no part of which went to the lender, the contract of loan would not, as to the latter, be rendered usurious. The present case is entirely outside of the doc-

time there invoked, and falls squarely within the rule announced in the first headnote, the correctness of which is no longer open to serious doubt or question. In this connection, see *Harrison v. Stiles*, 95 Ga. 264; 27 Am. & Eng. Ency. of Law, 1004; citing *Collamer v. Goodrich*, 30 Vt. 628; *McBroom v. Scottish etc. Co.*, 153 U. S. 318.

3. The deed executed by Mrs. Pottle and her mother, having been given to secure a usurious debt, was, under section 2057 of the code, void—certainly so at the option of the makers. It is, therefore, clear that, upon the election of Mrs. Pottle to repudiate it, this deed would prove utterly ineffectual to pass title into the loan company. It was earnestly insisted, however, that even if this deed was not ⁵⁷⁹ good as a muniment of title, the power of sale was valid, notwithstanding the usury. We feel constrained to take the contrary view. The power of sale was part and parcel of the usurious transaction, and must stand or fall with the deed by which it was created. Its sole purpose was to better enable the loan company to carry out and effectuate its illegal contract with the borrower; and it became as much an integral part of the scheme by which the usury laws were violated as did the deed itself, or the notes given in pursuance thereof, which with a view to covering up the real nature of the transaction, were made to recite an amount never in fact parted with by the lender. "To render a power valid, the purpose for which it is created must be a legal one": 18 Am. & Eng. Ency. of Law, 914. Certainly, if the sole purpose for which it is created is void, the power cannot be exercised: *Bates v. Bates*, 134 Mass. 110; 45 Am. Rep. 305. And even if the object of the power be a perfectly legitimate and valid one, it cannot be exercised if the instrument by which it is created be valid or inoperative. Thus, "a power of sale dependent on a void trust falls with the trust": *Penfield v. Tower*, 1 N. Dak. 216; citing *Benedict v. Webb*, 98 N. Y. 460, which is precisely in point. In other words, we understand the law to be: 1. If it is desired to create a power which will be operative, the instrument by which this object is sought to be accomplished must itself be both valid and legally sufficient; otherwise, the attempt to create the power will necessarily be abortive; or 2. If the power be itself vicious and incapable of legal enforcement, it cannot, of course, be exercised, whatever may be the character of the instrument by which the same was sought to be created. Applying either test to the power of sale contained in the deed now under consideration, it is clear such power could in no event be legally exercised; for not only was the instrument creating it

void from its inception, but the power itself is invalid and vicious, because its sole object was to render successful a ⁵⁸⁰ deliberately formed purpose to violate the law against usury.

3. It necessarily follows that the loan company, the grantee named in this usurious deed, could not—whether assuming to act as the holder of the legal title, or as the attorney in fact of Mrs. Pottle and her mother, the makers of that deed—execute any conveyance which would operate to pass to a third person the title to the premises in controversy. This is so, simply because the legal title never passed into the loan company under the deed in question; and, as has been shown, the power of sale incorporated therein was invalid, and conferred upon the company no authority whatsoever to act as the representative of the grantors, or either of them. As a purely abstract proposition of law it must certainly be recognized as true that a party having no title to property can convey none to another; and a vendee can claim to have acquired under a conveyance from his vendor no greater interest than the latter had to convey. Independently of the power of sale, therefore, the loan company could pass to a third person no title whatever to the lands involved in the present action. Whether the plaintiffs in ejectment acquired the legal title by virtue of the sale of the lands conducted by the loan company must, of course, depend upon the validity of that sale; and as the only authority under which the company assumed to act was a power of sale which was itself invalid and inoperative, the sale made in pursuance thereof is to be treated as a mere nullity. It is a fundamental principle of law that the purchaser at a void sale gets no title, and such was the character of the sale at which the plaintiffs bought.

Whether or not, as against an innocent purchaser at that sale who parted with his money in good faith and without notice of the usury, Mrs. Pottle would be estopped from setting up the invalidity of her deed to the loan company, is a question not now presented for adjudication. This was ⁵⁸¹ a plain action of ejectment, in which the plaintiffs based their alleged right to recover upon the naked proposition that the title passed to them under the deed from the loan company. They did not by their pleadings invoke any application of the doctrine of estoppel relatively to Mrs. Pottle, nor did they by evidence attempt to show that they purchased in ignorance of the usury, and therefore occupied the position of innocent purchasers entitled to protection by virtue of such doctrine. It seems clear, so far as they are concerned, that they were standing upon what they conceived to be their

legal, rather than their equitable, rights. It is true that counsel for Mrs. Pottle presented to the court a request to charge, by which they sought to obtain an instruction to the effect that if Lowe and Small purchased with knowledge of the usury, or with notice of facts putting them on inquiry as to this matter, they could not be regarded as innocent purchasers. The court, however, rightly declined to give this request in charge, because there was no evidence to authorize it. Upon the cross-examination of James L. Anderson, a witness for the plaintiffs, a number of questions were asked with a view to proving that Lowe and Small paid for the land with knowledge of the usury, or at least with knowledge of the fact that Mrs. Pottle intended to contest the legality and validity of the sale; but the answers of the witness, properly regarded, amounted to merely negative evidence, and failed entirely to establish the facts thus sought to be elicited. No other witness was examined as to this matter. So there was no proof at all upon which a finding that the plaintiffs had either express or implied notice of the usury could have been rightly based, and hence the court in its charge very properly refrained altogether from undertaking to deal with the doctrine of estoppel. The question of its application to the facts in hand was neither involved nor passed upon at the trial, and therefore it is not now before this court for decision. We cannot, of course, assume either ⁵⁸² that the plaintiffs were innocent purchasers, or that they were not. Upon this point, neither side has been fully and fairly heard in the court below. The case at the last trial was determined upon other issues. We are at liberty to deal with such questions only as were passed upon in the trial court and then brought here for review. Any ruling we might make upon a question not thus presented would be obiter dictum, and not really binding or conclusive upon any party at interest.

4. As has been seen, the plaintiffs signally failed to establish the contentions upon which they based their alleged right of recovery. Viewed in the light of the facts disclosed by the record now before us, the finding in their favor was wholly unwarranted and contrary to law; and a new trial should have been awarded the defendant.

Judgment reversed.

USURY—LENDER RETAINING BENEFIT OF COMMISSIONS. The principle governing transactions of the sort shown in the principal case is that the lender shall not receive for the use of his money a greater profit than allowed in the statute against usury, and, where he knowingly does so, that statute is violated. Hence, if it is a part of the transaction that the mediator shall divide with the lender the commission or other thing of value which is to be given the latter for

securing the loan, the transaction is usurious: Monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 197. See, also, note to *Stein v. Swenson*, 24 Am. St. Rep. 239.

USURY—EFFECT OF.—The statute of Arkansas denounces the taking of usury and upon all contracts for its payment impresses the stamp of absolute nullity; and this blight covers the entire transaction: *Vahlberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 73, and note. But usury cannot affect pre-existing indebtedness: *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44. The right to set up usury as a defense against a mortgage may be lost by laches, and if for this reason usury does not invalidate a mortgage, a sale under the power contained therein will not be enjoined by reason of it, unless the debtor brings into court the principal and the legal interest due: *Ferguson v. Soden*, 111 Mo. 208; 33 Am. St. Rep. 512.

KING v. STATE.

[99 GEORGIA, 686.]

CRIMINAL LAW—POSSESSION OF STOLEN PROPERTY. In a prosecution for burglary in entering a house and stealing chickens, the possession by the accused of chickens stolen from the same owner at the same time is not evidence of his guilt of the crime charged, where it does not appear that the chickens of which he was so in possession were any part of those taken from the house.

Blandford & Grimes, for the plaintiff in error.

S. P. Gilbert, solicitor general, contra.

687 LUMPKIN, J. 1. The plaintiff in error was convicted of the crime of burglary. The state's contention was, that he broke and entered a house, within the curtilage of the prosecutor's dwelling-house, with intent to steal certain chickens, and did actually steal the same. The evidence showed that the house in question was broken, and that a theft of chickens therein contained was committed. The material issue in the case was whether or not the accused was the guilty party. It also appeared that the prosecutor had some chickens in a coop, and that they disappeared simultaneously with those in the house. The offense was committed at night. There was no direct evidence to show the guilt of the accused, but the state relied mainly upon the fact that on the next morning he was found in possession of chickens belonging to the prosecutor, which had previously been either in the house or in the coop, or perhaps some of them may have been in one and some in the other. It does not affirmatively and distinctly appear, however, that the accused had in his possession any of the chickens which were taken from the house. Upon this state of facts, a charge in the following language was not fair to the accused, and did not present the true law of the case: "If he [the accused] has not satisfied you from the testimony in

the case, and he was found in the possession of them [the chickens], and a burglary had been committed, then, gentlemen, you would be authorized to return a verdict of guilty against him."

¶ In the light of what is said above, it is apparent that the court should have qualified this charge by further instructing the jury that, in order to justify a conviction of burglary, it was, in any view of the case, essential that they should be satisfied from the evidence that the chickens found in the possession of the accused were taken from the house which had been burglariously broken and entered. We therefore think that the giving of the charge above quoted is cause for a new trial.

2. We the more readily grant one in the present case for another reason. Even assuming that the accused was in possession of chickens which had been taken from the house, and that it was therefore incumbent upon him to satisfactorily explain how he obtained them, the evidence introduced by him in this connection was seemingly sufficient to show that he came honestly by the chickens he had. Three witnesses, whose testimony was in no material respect contradicted, testified that they saw the accused buy the chickens from a boy who publicly offered them for sale just outside the market-house on the morning following the burglary; and that the accused immediately, and without hesitation, surrendered them to the prosecutor when they were identified and demanded by the latter. We do not see why the jury should not have accepted as true the testimony of these witnesses, none of whom were impeached.

In expressing our opinion as to the sufficiency of this evidence, we do not wish to be understood as holding that the accused was under any obligation of showing that he acquired possession of the chickens honestly, though in the present case the explanation offered would seem to justify the conclusion that he purchased them in entire good faith. Any explanation which negatived his commission of, or participation in, the burglary, would have sufficed: *Falvey v. State*, 85 Ga. 157. In this case, therefore, the accused undertook, successfully we believe, to go even further than the law requires in accounting for his possession of the stolen property.

Judgment reversed.

CRIMINAL LAW—POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF GUILT.—The late possession of stolen property alone is not sufficient to sustain a verdict of guilty of larceny, but it is a circumstance tending to show guilt: *State v. Duncan*, 7 Wash. 336; 38 Am. St. Rep. 888, and note; *Cooper v. State*, 29 Tex. App. 8;

25 Am. St. Rep. 712, and note; State v. Warford, 106 Mo. 55; 27 Am. St. Rep. 322. The prosecution must identify stolen property found in the possession of the accused with that for the theft of which he is indicted, and this must be done by the most direct and positive testimony of which the case is susceptible: Garcia v. State, 26 Tex. 209; 82 Am. Dec. 605. See extended note to Hunt v. Commonwealth, 70 Am. Dec. 447-452.

SELLERS v. STATE.

[99 GEORGIA, 689.]

MURDER, PASSION AROUSED BY DISPUTE AS TO PROPERTY RIGHTS.—Where there is an honest difference of opinion between parties in respect to their interest in property, the fact that one of them proceeds, against the protest of the other, to assert his rights according to his understanding of them, cannot constitute a sufficient provocation for killing him, nor can it be deemed to excite an irresistible outburst of passion on the part of the slayer, so as to reduce the offense to voluntary manslaughter.

E. D. Graham, J. J. Summerall, and Estes & Walker, for the plaintiff in error.

J. M. Terrell, attorney general, and W. G. Brantley, solicitor general, contra.

⁶⁸⁹ LUMPKIN, J. The plaintiff in error, D. F. Sellers, was convicted of murdering John P. Dixon, and sentenced to imprisonment in the penitentiary for life. The evidence shows that Mrs. Sellers, the wife of the accused, was the owner of a field on which Joseph Dixon, a brother of the deceased, had, under a contract with Sellers, cultivated and raised a crop of corn. It is not absolutely clear whether the relation between Sellers and Joseph Dixon was that of landlord and tenant, or landlord and cropper. It is, however, immaterial to ascertain what may have been the precise truth as to this matter. A dispute arose between Sellers and Joseph Dixon over a division of the fodder raised on the field in question. It is ⁶⁹⁰ not essential to set forth the particulars of this dispute, further than to say that Joseph Dixon, evidently in good faith, claimed the right to remove from the land two-thirds of the fodder, while Sellers contended that Joseph Dixon's share was only one-half. On the day of the homicide, Joseph Dixon entered the field, accompanied by John P. Dixon and others, for the purpose of removing two-thirds of the fodder. While they were engaged in so doing, Sellers appeared on the scene and shot and killed John P. Dixon with a rifle, having no reason or excuse for so doing, other than the fact that the deceased was assisting

his brother in violating what Sellers regarded as the contract rights of himself, or of his wife, in the premises.

The accused introduced a considerable amount of testimony tending to show that he was afflicted with a disease which at times affected his mind to a greater or less extent, and that in consequence he was more than ordinarily susceptible to the excitement of passion; but it was not contended in his behalf that he was mentally incapable of committing crime, or legally irresponsible for the homicide. The state introduced in rebuttal much evidence tending to show that the accused had no mental infirmity, but was in all respects a thoroughly rational person. It was practically conceded at the trial that the accused was guilty of some offense, and the chief effort of his counsel seems to have been to have the killing reduced to voluntary manslaughter. With this end in view, the court was requested to charge, in substance, that if under the contract Joseph Dixon was entitled to remove only one-half of the crop of fodder, and was seeking to carry away two-thirds of the same, and the jury should believe that this "provocation" and the surrounding circumstances were sufficient to justify the excitement of passion, they should find the accused guilty of voluntary manslaughter, and not murder; and that, in determining the degree of the homicide, they might take into consideration the mental condition of the accused ⁶⁹¹ at the time of the killing, with a view to ascertaining whether or not he acted with malice aforethought, or upon a sudden impulse of passion. These requests were refused; and the judge, on the contrary, in effect instructed the jury that such "provocation" as that above indicated would not, in legal contemplation, be sufficient to justify the excitement of passion on the part of the slayer, so as to reduce the homicide to the grade of voluntary manslaughter.

Under the facts as they appear in the record, no error was committed, either in refusing to charge as requested, or in charging as stated. Civil disputes of this nature cannot be settled with deadly weapons. The deceased, as the assistant of his brother, had an undoubted right to enter the field upon which the crop was raised; and even though the latter may have been mistaken as to the proportion of the fodder to which he was lawfully entitled, neither he nor the brother who was killed were in any sense trespassers. The law will not for a moment tolerate the idea that their conduct should be treated as a cause for exciting in the breast of Sellers an outbreak of passion supposed to be irresistible. To hold that a mere difference of opinion between

parties as to their respective shares in a crop in which they are jointly interested, accompanied by peaceable acts only on the part of one of them in endeavoring to obtain what he honestly believed to be his legal rights, would be sufficient to justify the excitement of that degree of passion in the other which would make the killing of his adversary, under such circumstances, manslaughter, would be establishing an unheard of and exceedingly dangerous precedent. The proposition is too plain for serious discussion. The effect of promulgating such a doctrine would doubtless diminish to an enormous extent the amount of business standing upon the civil dockets of our courts, but the increase in the criminal business would be simply terrible. If, in a case like this, the tenant or cropper had slain the ~~002~~ landlord for no better reason than that set up by the accused in mitigation of his offense, the killing would as plainly have been murder as it was in the present instance. The conviction of murder was unquestionably right; and even if the jury had failed to recommend that the accused be imprisoned for life, this court would have had neither the power nor the disposition to disturb their finding.

Judgment affirmed.

HOMICIDE—WHEN JUSTIFIABLE—MANSLAUGHTER.—Although a trespass, not amounting to a felony, will not justify murder, and is not of itself sufficient to reduce a homicide to manslaughter, yet if the circumstances show that the killing was the result of a sudden, violent impulse of passion, provoked by the trespass, especially if accompanied by an assault with a deadly weapon, and acted upon before the passion has time to cool, this is such provocation as will operate to reduce the crime to manslaughter: *Crawford v. State*, 90 Ga. 701; 85 Am. St. Rep. 242. The provocation, however, should be of such a character as in the mind of a reasonable man would stir resentment to violence endangering life: *Note to Crawford v. State*, 85 Am. St. Rep. 250; see note to *Sullivan v. State*, 48 Am. St. Rep. 28.

LEWIS v. STATE.

[90 GEORGIA, 002.]

FORCIBLE ENTRY, WHAT IS.—An entry upon premises in defiance of the occupant, with such a display of force as to reasonably deter him from maintaining his possession, is a forcible entry.

FORCIBLE ENTRY, WHAT IS NOT.—A mere invasion of the premises of another during his absence, accompanied by such violence only as was incident to effecting an entry into an unoccupied dwelling-house thereon is but a naked trespass, not indictable as a forcible entry. There can be no forcible entry in the absence of acts naturally tending to excite a breach of the peace.

UNDER AN INDICTMENT CHARGING BOTH forcible entry and a forcible detainer, it is essential to sustain a conviction that both offenses be proved.

Gignilliat & Stubbs, for the plaintiff in error.

W. W. Fraser, solicitor general, and R. M. Hitch, contra.

692 LUMPKIN, J. 1. The definition of "forcible entry" embraced in section 338 of our Penal Code is substantially the same as the definition of this offense at common law. Every trespass upon the premises of another is, in a certain sense, forcible—that is, committed with "force and arms"; but it by no 693 means follows that every such trespass is indictable. In order to render a given entry "forcible" within the meaning of this word as used in the section cited, it would seem that it must be accompanied by some act of actual violence or terror directed toward the person in possession. This must have been the view entertained by this court when it had before it the case of Blackwell v. State, 74 Ga. 816, in which it was held that the object of the statute in question "is to prevent personal altercation and strife between parties claiming possession, and there must be force or terror tending to a breach of the peace, at least, and enough to satisfy the jury of one or the other, in order to authorize a verdict of guilty. Menaces, as well as force and arms, to or upon the occupant of the premises, make the offense." Again, in the case of Lissner v. State, 84 Ga. 669, 20 Am. St. Rep. 389, it appeared that the accused forcibly entered the premises in dispute over the protest of the person in possession, and in such manner as was calculated to deter the latter from resisting the unlawful entry; and, accordingly, it was held that: "To enter upon premises in defiance of the occupant, and with such a display of force as reasonably to deter him from maintaining his possession, is forcible entry." The decisions in these cases clearly indicate that the force, or show of force, and the entry thereby effected, which our law makes indictable, must be such as personally affect or disturb the occupant, rather than that force which is necessarily exerted against the premises invaded in accomplishing an unlawful entry, or trespass, thereupon. Such, we understand, was the nature of the unlawful violence which was an essential constituent of the offense at common law. Mr. Bishop declares that a forcible entry is one "made with an array of force adapted to create terror in those present opposing" it: 2 Bishop's New Criminal Law, sec. 489. Again, he says: "A mere unlawful or wrongful entry or detainer is not necessarily forcible within the law of this offense, but there must be such an act or acts as constitute 694 a breach of the peace, consisting either of an array of force threatening violence, or of actual violence, calculated to

intimidate": Bishop's New Criminal Law, sec. 504. "The act must in all cases exceed a mere trespass": Bishop's New Criminal Law, sec. 505. We extract the following definition of forcible entry from Anderson's Law Dictionary, page 404: "An entry made with violence, against the will of the lawful occupant, and without authority of law. Such entry as is made with a strong hand, with unusual weapons, an unusual number of servants or attendants, or with menace of life or limb; not a mere trespass." In 2 Taylor's Landlord and Tenant, section 787, it is said: "To make an entry forcible, there must be such acts of violence used, or such threats, menaces, or gestures exhibited, as give reason to apprehend personal injury or danger in standing in defense of the possession." Many cases bearing on the question are collected in a note to this section, from which we extract the following: "To constitute a forcible entry or a forcible detainer it is not necessary that anyone should be assaulted, but only that the entry or detainer should be with such numbers of persons and show of force as is calculated to deter the rightful owner from sending such persons away, and resuming his own possession": Citing *Milner v. McClean*, 2 Car. & P. 17. To the same effect, see *Pennsylvania v. Robison*, Addis. 17. "A forcible entry must be with a strong hand, with unusual weapons, or with menace of life or limb; it must be accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass is not within" the English statutes bearing upon this subject: 1 Russell on Crimes, 6th ed., 722, par. 3. In *Commonwealth v. Dudley*, 10 Mass. 403, it was held that, in order to constitute forcible entry, "there must be some apparent violence, in deed or word, to the person of another, or some circumstances tending to excite terror in the owner, and to prevent him from claiming or maintaining his right."

From the above authorities it would seem that a mere invasion of the premises of another during his absence, and accompanied with such violence only as was incident to effecting an entry into an unoccupied dwelling-house thereon, would be no more than a naked trespass, not indictable under the law declaring a "forcible entry" a criminal offense. To the contrary, however, is the following extract taken from 1 Hawkins' Pleas of the Crown, chapter 28, section 26, page 501: "It seems to be agreed that an entry may be said to be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any

other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house." We find the substance of this extract in several of the modern text-books on the subject, most if not all of which cite Sergeant Hawkins as authority, who in turn relies solely upon *Rex v. Bathurst* as supporting his text. That case, which may be found reported in Sayer's Reports, 225, does not, however, undertake to decide the question whether the mere breaking into a dwelling-house, unoccupied at the time, during the absence of the owner, would constitute the offense of forcible entry. Nor has it been so understood in England, as is shown by more recent decisions.

The court, in that case, was simply passing upon a demurrer to an indictment which, in the first count, did charge entry "with a strong hand," and the fact that the premises were "in the peaceful possession of the prosecutor," but failed to allege what estate the prosecutor had therein. This count was held not to be good; but the indictment was sustained upon the second count, which charged "that the defendant did unlawfully and injuriously, with force and arms, enter into the dwelling-house of the prosecutor." The objection urged to this second count was, not that it failed to allege the presence of the prosecutor ⁶⁰⁰ upon the scene at the time of the entry, but merely "that as the entry is not charged in this count to be with a strong hand, as well as with force and arms, there is not charge of actual force, inasmuch as the words 'force and arms,' which are contained in the declaration in every action of trespass, do not necessarily imply force." This was the sole point ruled upon, as is shown by the comments of Ryder, C. J., who, in reply to the objection urged, said: "As the words 'with a strong hand' are contained in the statute, it is necessary that these words should be contained in an indictment upon the statute. But it is not necessary that these words should be contained in an indictment at the common law for a forcible entry. The words 'force and arms' in an indictment at the common law for a forcible entry do always mean actual force." And the chief justice takes pains to add that "if issue had been joined in this indictment upon the plea of not guilty, actual force must have been proved, or the defendant could not have been found guilty upon the second count; an entry without actual force being no more than a trespass." So, as will have been seen, *Rex v. Bathurst*, Sayer, 225, simply ruled that the indictment under consideration was technically sufficient to uphold a conviction of forcible entry, in the

event issue were joined thereon, and all the elements constituting the offense were proved at the trial. It certainly did not attempt to go further; and even the force of the ruling actually made was subsequently greatly restricted in its operation. Indeed, this case seems to have been regarded by the English courts as *sui generis*—a law unto itself alone. It received a decidedly adverse criticism at the hands of Lord Mansfield, in *Rex v. Storr*, 3 Burr. 1698, who declined to extend its application or to recognize that it laid down any general rule by which the sufficiency of the indictment then under consideration could be tested. Said he (page 1701): "The case of *Rex v. Bathurst, Sayer*, 225, does not seem to me to lay down any such rule as 'That *vi et armis* alone implies such a force as will, of itself, support an indictment.' There the fact itself naturally implied force—it was turning and keeping the man out of his dwelling-house—and done by three people. Three of the judges lay a stress upon that circumstance, of its being an entry into a dwelling-house; and the parties who framed the indictment plainly had a view to indict for a forcible entry." See, also, the cases of *Rex v. Atkins*, 3 Burr. 1706, and *Rex v. Bake*, 3 Burr. 1731, reported in the same volume, wherein Bathurst's case was urged as authority, but the indictments were nevertheless quashed. In the former, the indictment was "for pulling off the thatch of a man's dwelling-house, he being in peaceable possession of it." In the latter, the indictment was for "breaking and entering a close (not a dwelling-house), and unlawfully and unjustly expelling the prosecutors and keeping them out of possession"; and it was held that the indictment was defective because it did not show upon its face "such an actual force as implies a breach of the peace, and makes an indictable offense." "For, otherwise," says Mr. Justice Wilmot, "it is only a matter of civil complaint." The conclusion seems irresistible, in view of the above, that the case of *Rex v. Bathurst, Sayer*, 225, cannot possibly be regarded as conclusive authority for the text above quoted from Hawkins' *Pleas of the Crown*.

In the course of our investigation, we consulted the American and English Encyclopedia of Law, and encountered the assertion that it was not "necessary that the force or violence should be used against the person of the occupant," but that "forcibly breaking into a house in the absence of the occupant" would constitute the offense of forcible entry: 8 Am. & Eng. Ency. of Law, 107, tit. "Forcible Entry and Detainer." An examination of the cases cited in support of the text will show, however, that the

decisions therein rendered do not purport to be declaratory of the common law, but were ⁰⁰⁰ based solely upon special statutes. For instance, in *Mason v. Powell*, 38 N. J. L. 576, Chief Justice Beasley quotes the New Jersey statute, which in terms declares that "breaking open the doors, windows, or other part of a house, whether any person be in it or not," shall constitute the offense. So, in *Davidson v. Phillips*, 9 Yerg. 93, 30 Am. Dec. 393, it appears that the decision was based upon the Tennessee statute, which is couched in almost identically the same language as that above quoted. Likewise, in the cases cited from the reports of California and Wisconsin, the decisions were based upon special statutes, and do not undertake to decide what would constitute the offense at common law: See *Treat v. Forsyth*, 40 Cal. 484; *Steinlein v. Halstead*, 42 Wis. 422. These cases, therefore, are neither authoritative nor helpful in arriving at a proper conclusion in the case now before us; for, as above stated, section 338 of our Penal Code adopts the common-law definition of forcible entry, and contains no language which would warrant even an inference that the act of breaking into an unoccupied house during the absence of the owner was intended to be made indictable. The word "menaces" cannot be arbitrarily ignored, and it is difficult to conceive how it can be given any effect, under the peculiar phraseology of our statute, unless we hold, as herein announced, that the "menaces, force, and arms" contemplated are such as are directed against the person of the occupant, and not such as are directed against the premises themselves—if, indeed, it were possible that a house could by "menaces" be intimidated into a state of submission to an unlawful entry.

We are the better satisfied with the conclusion reached in the present case when we consider that, at common law, persons were subject to indictment only for wrongs committed against the public itself—mere civil injuries committed against individuals not being redressed under penal laws. No forcible entry was, under that law, punishable ⁰⁰⁰ as a criminal offense, unless it involved a breach of the peace and the security of the state, matters concerning which the public is vitally interested. Violent acts and manifestations calculated to create public disturbance and disorder were therefore rendered indictable; but acts in the nature of mere trespasses, and which did not naturally tend to excite breaches of the peace, were not considered as public, but rather as mere civil, wrongs.

2. The indictment in the present case, in a single count, charged the two offenses of forcible entry and forcible detainer.

It has been held that this could properly be done: *Blackwell v. State*, 74 Ga. 816. That case, however, lays down the rule that where both offenses are thus charged, it is essential to a conviction under the indictment that both be proved. As the evidence in the case now under consideration did not warrant a conviction of a forcible entry, the verdict must be set aside.

Judgment reversed.

FORCIBLE ENTRY—WHAT AMOUNTS TO.—An entry is not forcible, unless accompanied by some circumstance of violence or terror; the behavior or speech of those making the entry must be such as to give just fear of bodily hurt, or imply a purpose of using force against all who make any resistance: *Note to Lambert v. Robinson*, 44 Am. St. Rep. 331. There must be either actual force used, or such demonstration of force as is calculated to intimidate or alarm, or as involves or tends to a breach of the peace: *State v. Mills*, 104 N. U. 905; 17 Am. St. Rep. 706. See, also, *Lissner v. State*, 84 Ga. 669; 20 Am. St. Rep. 389. A mere trespass and not a forcible entry is constituted where a person enters an unoccupied house in the night-time furtively and without force or violence: *Foster v. Kelsey*, 86 Vt. 189; 84 Am. Dec. 676, and note.

FORCIBLE ENTRY AND DETAINER—VERDICT AND JUDGMENT.—A conviction may be had for forcible detainer alone, where the complaint alleges forcible entry and forcible detainer, and a forcible detainer only is proved: *Foster v. Kelsey*, 86 Vt. 189; 84 Am. Dec. 676.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

POTTS v. BREEN.

[167 ILLINOIS, 67.]

BOARDS OF HEALTH—CONSTRUCTION OF STATUTE.—A statute creating a state board of health and giving it general supervision over the health and lives of citizens, is to be construed with reference to the specific duties imposed and powers conferred upon the board by the act taken as a whole.

BOARDS OF HEALTH.—A GENERAL POWER OF SUPERVISION over the health and lives of citizens, given by statute to a state board of health, is to be exercised in conformity with law and must be confined, within reasonable limitations, to the performance of administrative duties imposed upon the board by the statute.

BOARDS OF HEALTH—LIMITATION OF POWER.—The power to make rules and regulations for the preservation or improvement of the public health, conferred by statute upon a state board of health, does not authorize it to prescribe conditions upon which citizens may exercise rights and privileges guaranteed by public law.

BOARDS OF HEALTH—LIMITATION OF POWERS.—The powers conferred by statute upon a state board of health are limited to the proper enforcement of statutes, or provisions thereof, having reference to emergencies requiring action on the part of the agencies of government to preserve the public health and to prevent the spread of contagious or infectious diseases.

SCHOOLS—VACCINATION OF CHILDREN—REQUIREMENT AS TO.—There is no law of the state of Illinois requiring vaccination as a condition precedent to the exercise of the legal right of every child in that state, of proper age, to attend public schools.

SCHOOLS—VACCINATION OF CHILDREN.—THE POWER TO COMPEL the vaccination of children as a prerequisite to the exercise of their right to attend public schools can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health.

SCHOOLS—VACCINATION OF CHILDREN—UNREASONABLE REQUIREMENT.—A rule, adopted by a state board of health, requiring children to be vaccinated as a prerequisite to the exercise

of their right to attend public schools, is not a reasonable one, where smallpox does not exist in the community, and there is no cause to apprehend its appearance.

VACCINATION OF CHILDREN—RIGHT TO EXCLUDE FROM SCHOOL FOR WANT OF.—The directors of a public school have no right, either under their own rules, or by order of a state board of health, to exclude children who refuse to be vaccinated, unless it is necessary, in cases of emergency, or reasonably appears to be necessary, to prevent the contagion of small-pox. A remote fear of the disease does not justify such exclusion.

Gee & Barnes, for the appellants.

C. J. Borden and C. F. Breen, for the appellees.

⁶⁸ **CARTER, J.** Two suits between the same parties were begun, one a petition for a writ of mandamus to compel appellants to admit appellees to the public school of their district, and the other an action of trespass to recover damages for the exclusion of appellees from such school. The cases were tried together upon the following facts agreed upon, viz., Jennie Breen and Jim Breen, appellees, were the children of Michael Breen, a resident and taxpayer of district No. 5, township 2, range 12, in Lawrence county, Illinois, of which district the appellants were directors. These directors, acting under a certain rule and order of the state board of health, made a general order, applicable to all schools in their district, requiring that all pupils should be vaccinated before being admitted to such schools. They also employed a physician to vaccinate the pupils, and instructed and ordered the teacher of the school in question to impart no instruction to appellees until they should comply with said order, and appellees were refused admission to the school on the sole ground that they had failed and refused to comply with such order, the father of appellees absolutely refusing to permit his children to be vaccinated. The directors acted in good faith, under the belief that they were performing a duty imposed upon them by law, and used no direct force upon appellees, but simply denied them admission to the school after repeated refusals to obey the orders relating to vaccination.

⁶⁹ In their answer to the petition the directors alleged that the state board of health made and promulgated the following order:

“Resolved, That by the authority vested in this board, it is hereby ordered that on and after January 1, 1882, no pupil shall be admitted to any public school in the state without presenting satisfactory evidence of proper and successful vaccination.”

And that at the January meeting, 1894, the said state board of health passed the following resolution:

"Resolved, That the power of the state board of health, under the law creating said board of health, to order the vaccination of all school children, is clear and unquestionable. The consequent duty of the board of school directors to see that such order is strictly enforced in their respective districts is equally clear, and the said order of the board of health is their sufficient authority for so doing."

These orders of the state board of health were sent to the superintendent of schools of said Lawrence county, and were by him transmitted to the appellants, with written directions of the state board of health to enforce the same, and appellants made an order that all children attending the said school in their district should be vaccinated, or should show a physician's certificate of previous vaccination, as a condition of attendance upon the said school.

The trial court rendered judgment against appellants, granting the peremptory writ of mandamus as prayed, and assessed appellees' damages in the trespass case at one cent. These judgments have been affirmed on appeal by the appellate court, and appellants have prosecuted this appeal to this court.

So far as the record discloses, appellees had not been exposed to infection by smallpox but were in perfect health, and there was no reason for their exclusion except that they had not been vaccinated. There was no epidemic of smallpox prevailing or apprehended in the vicinity of the school. The record presents the question whether or not the state board of health, or the appellants, ⁷⁰ as such school directors, acting under its order or otherwise, had any power to impose as a condition of the admission of appellees to the public schools the requirement of vaccination; and further, if such power existed and could be enforced as a police regulation for the preservation of the public health and to prevent the spread of contagious and infectious diseases, was the regulation and its enforcement, under the facts appearing in the record, reasonable.

Section 2 of the act creating the board of health (Laws 1877, p. 208) is as follows: "The state board of health shall have the general supervision of the interests of the health and life of the citizen of the state. They shall have charge of all matters pertaining to quarantine, and shall have authority to make such rules and regulations, and such sanitary investigations, as they

may, from time to time, deem necessary for the preservation or improvement of public health; and it shall be the duty of all police officers, sheriffs, constables, and all other officers and employes of the state, to enforce such rules and regulations, so far as the efficiency and success of the board may depend upon their official co-operation." Section 3 provides: "The board of health shall have supervision of the state system of registration of births and deaths, as hereinafter provided. They shall make up such forms and recommend such legislation as shall be deemed necessary for the thorough registration of vital and mortuary statistics throughout the state. The secretary of the board shall be the superintendent of such registration." Section 4 makes it the duty of all physicians and accoucheurs to report to the county clerk "all births and deaths which may come under their supervision, with a certificate of the cause of death, and such correlative facts as the board may require, in the blank forms furnished as hereinafter provided." Section 8 requires county clerks to render complete reports of all births, marriages, and deaths to the board of health, and ⁷¹ section 9 requires the board of health to prepare the necessary forms. Section 12 provides for an annual report by the board to the governor, "and such report shall include so much of the proceedings of the board and such information concerning vital statistics, such knowledge respecting diseases, and such instruction on the subject of hygiene, as may be thought useful by the board for dissemination among the people, with such suggestions as to legislative action as they may deem necessary." By reference, also, to the act of the general assembly to regulate the practice of medicine in this state, which was passed at the same session of the legislature and which makes reference to the state board of health, and provides for the examination and licensing by said board of persons desiring to practice medicine, it clearly appears that one of the most important duties of the board was to ascertain and certify to the qualifications of practicing physicians and surgeons, and to detect quacks, and to prevent them and all ignorant pretenders from imposing upon the sick and helpless.

It is clear that no such power as claimed by the state board of health has been conferred upon it, unless by the broad and general language of the first section of the act creating it. But the general terms there employed must be construed in relation to the more specific duties imposed and powers conferred by the act taken as a whole, and when thus construed these general terms are restricted so as to express the true intent and meaning of the

legislature. Take, for example, the first sentence, viz: "The state board of health shall have the general supervision of the interests of the health and life of the citizen of the state." The scope of the language there employed is practically unlimited, and were it not held to be restricted by well-known legal principles applicable in the interpretation and construction of statutes, it would appear to confer more power on this board than the legislature itself possessed. Plainly, it ⁷² was not intended that any general supervisory power over the health and lives of citizens of the state should be exercised by the board otherwise than in conformity to law, and such as should be necessary, within reasonable limitations, in the performance of the administrative duties which were or should be imposed upon the board by statute. It had and could have no legislative power. Its duties were purely ministerial, and the provision of the statute authorizing the board to make such rules and regulations as it should, from time to time, deem necessary for the preservation or improvement of the public health, cannot be held to confer that broad discretionary power contended for—to prescribe conditions upon which the citizen of the state may exercise rights and privileges guaranteed to him by public law.

In *Huesing v. Rock Island*, 128 Ill. 465, 15 Am. St. Rep. 129, it was contended that the city had the power, under clause 78 of section 1, article 5, of the city incorporation act, to construct and maintain a city abattoir, as a sanitary measure. This clause is as follows: "To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." This court, however, held that, in view of the fact that the same section contained other provisions authorizing the city council to do certain specified acts for the preservation of the health of the city and the suppression of disease, the general provision did not enlarge the powers conferred by the special provisions.

As recently held by the supreme court of Wisconsin in a similar case, we are of the opinion that the powers of the board are limited to the proper enforcement of statutes, or provisions thereof, having reference to emergencies requiring action on the part of the agencies of government to preserve the public health and to prevent the spread of contagious or infectious diseases. It will be observed that after the first section the powers and duties of the board with reference to different subjects ⁷³ are minutely specified, and it is required to make report to the governor, and to include therein "such information concerning vital statistics, such

knowledge respecting diseases and such instruction on the subject of hygiene, as may be thought useful by the board, for dissemination among the people, with such suggestions as to legislative action as they may deem necessary." Its duty to recommend legislation is repeated more than once in the act in connection with specifications of the powers and duties of the board, and from no point of view can we regard it as having been within the legislative intent to confer by the first section plenary powers upon the board in all matters pertaining to the public health, without regard to other provisions of the statute or further action by the legislature.

Section 1 of article 8 of the constitution provides that "the general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." And the statute provides that the directors "shall establish and keep in operation for at least one hundred and ten days of actual teaching in each year, . . . a sufficient number of free schools for the accommodation of all children in the district over the age of six and under twenty-one years, and shall secure to all such children the right and opportunity to an equal education in such schools." And the statute further provides that they shall adopt and enforce all rules and regulations for the management and government of the schools, and may suspend or expel pupils who may be guilty of gross disobedience or misconduct. The statute also contains provisions of similar import relating to schools in more populous districts and in cities. It is therefore seen that the right or privilege of attending the public schools is given by law to every child of proper age in the state, and there is nowhere to be found any provision of law prescribing vaccination as a condition precedent to the ⁷⁴ exercise of this legal right. Whether the legislature has the power to make such a requirement or not it is not necessary here to consider. It is sufficient that it has not done so. And it cannot be supposed that the legislature has undertaken, and not expressly, but by mere implication from the general language used in creating the state board, to confer upon that mere administrative body such vast power over the rights and liberties of the individual citizen as to deprive him of his constitutional and statutory rights unless he shall submit his body to be inoculated with vaccine virus as a mere precaution against some possible future contagion of smallpox. It is doubtless true that in a large number of school districts in interior parts of the state no case of smallpox has ever existed in the history of the state, and yet by this order of the

board no citizen who has children to educate, although compelled by law to pay taxes to support the public school, can send his child to such school without first having such child vaccinated as a precaution against a disease which had never appeared, and where there was no apparent danger that it would ever appear in the vicinity. The power to compel vaccination, or to require it as a condition precedent to the exercise of some right or privilege guaranteed to the citizen by public law, can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. Without the necessity, or reasonable grounds upon which to conclude that such necessity exists, the power does not exist. As such, the board of health has no more power over the public schools than over private schools or other public assemblages, and its order applying to public schools only requiring vaccination as a prerequisite to the exercise of the right to attend a public school, could be justified only upon reasonable grounds appearing that the contagion of smallpox would more likely originate in or be ⁷⁵ disseminated from the public schools than from other assemblages. Whether or not it might be invested with more power in this respect is a question not involved here and not necessary to consider.

While school directors and boards of education are invested with power to establish, provide for, govern, and regulate public schools, they are in these respects nowise subject to the direction or control of the state board of health, and, as before pointed out, they have no authority to exclude children from the public schools on the ground that they refuse to be vaccinated; unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. Undoubtedly, also, children infected with or exposed to smallpox may be temporarily excluded or the school be temporarily suspended; but, like the exercise of similar power in other cases such power is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases. No one would contend that a child could be permanently excluded from a public school because it had been exposed to smallpox, or that the school could be permanently closed because of the remote fear that the disease of smallpox might appear in the neighborhood, and that if the school should then be open and children in attendance upon it the public would be exposed to the contagion. And upon the same line of reasoning, without a law making vaccination com-

pulsory, or prescribing it, upon grounds deemed sufficient by the legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned.

We are not called upon to consider whether or not vaccination is a preventative, or the best known preventative, of smallpox. That it is so seems to be the consensus ⁷⁶ of opinion of a learned and honorable profession, borne out by the history of its use for a century, and we can only so regard it; but, when compulsorily applied, it must, like all other civil regulations, be applied in conformity to law. However fully satisfied, by learning and experience, a board might be that anti-toxine would prevent the spread of diphtheria, no one could contend that a rule enforcing its use as a condition precedent to the admission of a child to the public schools would, as the law now is, be valid. It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be.

The same conclusion was reached by the supreme court of Wisconsin, in *State v. Burdge*, 95 Wis. 390, 60 Am. St. Rep. 000, in a case similar in all respects to this. In that case the court also, upon the question of the power of the legislature to delegate to such board the power to make a rule having the force of a general law, cited *Dowling v. Lancaster Ins. Co.*, 92 Wis. 63, which held, that the legislature could not delegate to the insurance commissioner the power, essentially legislative, to prepare, approve, and adopt a form of "a standard fire insurance policy" for use in that state, and which use was to be enforced by penal sanction of the act. See, also, on this subject, *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72, 45 Am. St. Rep. 650, and *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182; 50 Am. St. Rep. 400. See, also, *Tugman v. Chicago*, 78 Ill. 405.

As said in *State v. Young*, 29 Minn. 551: "It is a principle not questioned, that except where authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power—cannot confer ⁷⁷ on any body or person the power to determine what shall be law. The legislature only must determine this."

Hurst v. Warner, 102 Mich. 238, 47 Am. St. Rep. 525, construed an act of the Michigan legislature which provided that, in certain contingencies specified in the act, the state board of health should be authorized to establish a quarantine, and to make rules for the disinfection of baggage belonging to persons coming from a country where contagious disease exists, and, through an inspector acting thereunder, to detain for disinfection baggage of passengers passing through the state and coming from localities where a dangerous, communicable disease exists. It was held by the court that the act did not authorize a rule subjecting the baggage of all immigrants to disinfection, whether such immigrant came from a part or locality where dangerous, communicable disease existed or not.

The case of *Abeel v. Clark*, 84 Cal. 226, was a mandamus proceeding to compel the principal of a public school to admit Abeel as a scholar, who had been refused admission because he had not complied with the vaccination act. This act provided that the school trustees and board shall "exclude from the benefits of the common schools any child or any person who has not been vaccinated." The act was held constitutional. The court say: "Vaccination, then, being the most effective method known of preventing the spread of the disease referred to [smallpox] it was for the legislature to determine whether the scholars of the public schools be subjected to it."

The case of *Duffield v. School Dist.*, 162 Pa. St. 476, was a mandamus proceeding to compel the admission of plaintiff's minor child into the common schools of Williamsport. The facts in this case were, that there was an ordinance of the city of Williamsport in force providing that no pupil "shall be permitted to attend any public or private school in said city without a certificate of a practicing physician that such pupil has been subjected to the process of vaccination"; that smallpox was then ⁷⁸ existing in Williamsport and had been epidemic in many near-by cities and towns; that the board of health and the school board, in view of the general alarm prevailing in the city over the report that a case of smallpox was in the city, had adopted a resolution in conformity with said city ordinance. The questions raised related to the power of the school board to adopt reasonable health regulations, and to the reasonableness of the particular regulation complained of, and the action of the board was sustained. But the case was unlike the one at bar in the fact that smallpox was then in the city, and was prevalent in adjoining communities. A similar conclusion was reached in *Bissell v. Davison*, 65 Conn. 183,

but the general statutes of Connecticut expressly conferred upon the school committee the power exercised by it.

'The cases of *In re Walters*, 84 Hun, 457, 33 N. Y. Supp. 322, and *Abeel v. Clark*, 84 Cal. 226, involved the constitutionality of statutes requiring all children to be vaccinated before being admitted to the public schools, and such statutes were held to be constitutional. That question is not involved here, and the reasoning employed in those cases does not apply where this legislative power is exercised by an administrative board, and not by the legislature itself. Nor can the rule in question be regarded as a reasonable one, where, as in this case, smallpox did not exist in the community, and where there was no cause to apprehend that it was approaching the vicinity of the school or likely to become prevalent there. The record wholly fails to show that there were any grounds upon which the board could have any reasonable belief that the public health was in any danger whatever.

Neither the board of health nor the board of directors having any power to make and enforce the order in question under the facts of this case, it follows that appellees were unlawfully excluded from the school.

The powers of school officers under the statute have been considered by this court in numerous cases: *Rulison* ⁷⁹ v. *Post*, 79 Ill. 567; *Trustees of Schools v. People*, 87 Ill. 303; 29 Am. Rep. 55; *McCormick v. Burt*, 95 Ill. 263; 35 Am. Rep. 163; *Chase v. Stephenson*, 71 Ill. 383; *People v. Board of Education*, 101 Ill. 308; 40 Am. Rep. 196, and other cases. But nothing said in any of those cases sustains the contention of appellants.

The judgment of the appellate court affirming the judgment of the circuit court is affirmed.

POWER TO COMPEL PERSONS TO SUBMIT TO VACCINATION.—It seems that statutes, imposing vaccination as a condition upon which children may be permitted to attend the public schools, have generally, so far as questioned, been sustained: See monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 546, on quarantine and health laws and regulations. A board of health, having statutory power to guard against the introduction of infectious or contagious diseases, has no power, however, through the health commissioner, and for the purpose of guarding against smallpox, to order a person who refuses to be vaccinated to be immediately quarantined, and to continue in quarantine until he consents to such vaccination, unless there is, in fact, before him a case where the party is either infected with, or has been actually exposed to, the disease of smallpox: *Matter of Smith*, 146 N. Y. 68; 48 Am. St. Rep. 769. It is not a legitimate exercise of such a power to act on mere fear or apprehension of possible danger: Note to *Train v. Boston Disinfecting Co.*, 59 Am. Rep. 118.

**HUYETT & SMITH MANUFACTURING COMPANY v.
CHICAGO EDISON COMPANY.**

[167 ILLINOIS, 233.]

APPEAL.—A STIPULATION OF FACTS must be treated in the same way as the evidence would be treated if the witnesses had been called and sworn. Hence the appellate court may, on appeal from the circuit court, under the Illinois system of courts, draw ultimate conclusions from agreed facts the same as from the testimony of witnesses.

APPEAL—CONCLUSIVENESS OF FINDINGS ON AGREED FACTS.—Under the Illinois statute, which provides that the appellate court's finding of facts, if different from that of the trial court, shall be final and conclusive when the facts as found are recited in its judgment, the appellate court's finding of facts is final in cases at law tried in the lower court, without a jury, on agreed facts.

CONTRACT IS ENTIRE, WHEN.—A contract to put in and complete a ventilating system for a given sum of money, all of which is to be paid in thirty days after acceptance of the work, is an entire contract.

CONTRACTS—COMPLETE PERFORMANCE NECESSARY FOR RECOVERY ON ENTIRE CONTRACT.—If the subject matter of an entire contract has been destroyed by fire, or otherwise, without the fault of either party, before the contract is fully performed, there can be no recovery, on a quantum meruit, or otherwise, for a part performance thereof.

Action by the Huyett & Smith Manufacturing Company against the Chicago Edison Company, upon a quantum meruit to recover for materials furnished and labor performed under an express contract, which was not completed by the plaintiff. The Chicago Edison Company was bound by a contract with the National Temple of Music to place in the First Regiment Armory building a complete ventilating system for a lump sum of money, payment of the entire sum to be made in thirty days after the work was completed. This contract was sublet to the plaintiff. Before the completion of the work, the building was destroyed by fire without the fault of either party to this action. Neither the plaintiff nor the defendant had any control of the building, or anything in it, except the materials belonging to each company. The plaintiff company, at the time of the fire, had furnished certain materials and had done certain work under its contract, which it charged to the defendant company, but it did not appear that the materials furnished ever became the property of the defendant company; and the work not having been completed, the defendant company had not been asked to accept it. In the circuit court, the parties waived a jury and a trial was had before the court on an agreed written statement of facts. There was a judgment for the plaintiff for twelve hundred and thirty dollars,

which, on appeal, was reversed in the appellate court. The facts as found by the court last named were recited in its final judgment, and the plaintiff appealed.

Bulkley, Gray & Moore, for the appellant.

Isham, Lincoln & Beale, for the appellee.

230 CRAIG, J. It is plain from the record that the appellate court did not reverse the judgment on account of any erroneous ruling of the circuit court on propositions of law. If the reversal had been for that reason the cause would have been remanded, so that the error could have been corrected on another trial. On the other hand, it is plain that the appellate court found the facts different from the circuit court, and reversed because on the facts as found the plaintiff could not recover. Upon going to the record, it will be seen that the appellate court made the following finding of facts: "And the court finds that, under the agreed statement of facts in this case, the property which the plaintiff, in accordance with its contract of April 4, 1893, placed in the First Regiment Armory, was, at the time of its destruction by fire, that of the plaintiff, and that the contract of April 4, 1893, between the plaintiff and defendant, contemplated that the First Regiment Armory would remain in existence so that the plaintiff could do the work thereon by its said contract undertaken, and that the destruction by fire of the First Regiment Armory and the property placed therein by the plaintiff, without the fault or negligence of either the plaintiff or defendant, terminated the said contract, and that the plaintiff, because of such fire and destruction 237 not having completed or complied with its contract, is not entitled to recover anything from the defendant for goods furnished and the work done by it under its said contract, and therefore the court finds that the defendant did not undertake or promise as the plaintiff in its declaration alleged, and therefore final judgment for the defendant is here entered."

The appellate court having found the facts different from the circuit court and incorporated that finding in its final judgment and reversed on the facts, is any question of law presented for our consideration?

Section 87 of the practice act (Hurd's Stats., p. 1023) provides: "If any final determination of any cause, as specified in the preceding sections, shall be made by the appellate court as the result, wholly or in part, of the finding of the facts concerning the matter in controversy different from the finding of the court from

which such cause was brought by appeal or writ of error, it shall be the duty of such appellate court to recite in its final order, judgment, or decree the facts as found, and the judgment of the appellate court shall be final and conclusive as to all matters of fact in controversy in such cause." Under this statute it is manifest no question of law is presented by the record before us for our consideration. The question is not a new one in this court. The same question arose in *Rogers v. Chicago etc. R. R. Co.*, 117 Ill. 115, and we held that no question of law was involved. See, also, *Williams v. Forbes*, 114 Ill. 167, where the same question was involved.

It is, however, said in the argument that the facts were agreed upon in the circuit court, and hence the section of the statute cited is inapplicable. Where the parties in a case pending in the circuit court make an agreement in regard to what the facts or the evidence may be upon which the court is to decide the case, that agreement takes the place of the evidence of witnesses who might, in the absence of an agreement, be called and give their evidence²³⁸ in court, and the agreement is to be treated in the same way as the evidence would be treated if the witnesses had been called and sworn. When the case reaches the appellate court, the question is not what A, B, or C has sworn to on the trial, or what the stipulation may be in regard to this or that particular fact; but the question is, What is the ultimate fact or facts upon which the rights of the parties depend? As was properly said in *Brown v. Aurora*, 109 Ill. 165, 168: "The appellate court, where it differs from the conclusions reached by the trial court, is required to recite in its final order the facts as found by that court. The expression, 'facts as found,' necessarily implies the drawing of a conclusion or inference from the evidentiary facts embodied in the bill of exceptions, and this conclusion or inference to be drawn is nothing more than the *factum probandum*, or ultimate fact or facts, upon which the case depends and which it was the duty of the appellate court to find." Here the appellate court found in the bill of exceptions a stipulation of the parties used on the trial, which purported to be the evidence upon which the trial court decided the case. From the evidence thus presented the appellate court determined what the ultimate facts were, and incorporated that finding in the final judgment. The judgment of the appellate court was predicated on that finding, and the statute says the judgment shall be conclusive as to all matters of fact.

But, conceding that the record presents the question of law which has been discussed in appellant's argument, we are not pre-

pared to hold that the judgment of the appellate court is erroneous. On the trial in the circuit court the court held that the destruction of the building in question by fire annulled the contract and "excused the plaintiff from performance of it, and it excused the defendant from paying the contract price, and left the parties in exactly the same condition as though no contract had been made, and therefore that the plaintiff is ²³⁹ entitled to recover, under the common counts, for the value of the materials furnished and labor performed." As we understand the contract, the materials which the appellant furnished at or in the building never became the property of the appellee. They were destroyed without the fault of appellee, and upon what principle the plaintiff could recover under the common counts, or under any form of declaration, for the value of the materials furnished and labor performed we do not perceive. The labor was performed and the materials were furnished under a contract entered into between the parties, and by that contract the rights and the obligations of the parties must be determined. The rule is well settled that, where labor has been performed and services rendered under an express contract, a recovery must be had, if at all, on the contract. If the contract had been separable, providing for the payment of a certain sum of money at a specified date upon the delivery of certain articles in the building, the plaintiff, so far as it had performed, might be entitled to recover. But such is not the contract. On the other hand, the contract is entire, providing that appellee was to be paid thirteen hundred and sixty dollars thirty days after the completion and installation of a ventilating system in the building, in accordance with certain plans and specifications.

In Parsons on Contracts, volume 2, eighth edition, page 517, the author says: "If the part to be performed by one party consists of several separate and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. . . . And if the consideration to be paid is single and entire the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items."

In Adams v. Nichols, 19 Pick. 275, 31 Am. Dec. 137, where a person contracted to build a house on the land of another, and the ²⁴⁰ house was destroyed by fire before its completion, it was held that the contractor was not discharged from his obligation to fulfill his contract. It is there said: "The general rule on this

subject is laid down and well explained in a note to *Walton v. Waterhouse*, 2 Wm. Saund. 422. It is, that where the law imposes a duty upon anyone, inevitable accident may excuse the nonperformance, for the law will not require of a party what, without any fault of his, he becomes unable to perform. But where the party, by his agreement, voluntarily assumes or creates a duty or charge upon himself, he shall be bound by his contract, and the nonperformance of it will not be excused by accident or inevitable necessity, for if he desires any such exception he should have provided for it in his contract."

In *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349, where there was a contract to build a schoolhouse for the sum of six hundred and seventy-eight dollars, and the building was destroyed when almost completed, it was held that the contract was entire and that money advanced on the contract could be recovered back. It is there said: "He was not only to complete it in accordance with its terms, but was to deliver it over to the plaintiffs thus finished, or offer to deliver it, before his whole duty was performed. Now, it is undeniable that the builder did not do this. . . . This court has declared the law in this state to be, that a contract for the building of a vessel or other thing in esse does not vest any property in the party for whom it is to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery, and approved by such party. . . . And it was also held that the law is the same though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly."

In *Wells v. Calnan*, 107 Mass. 515, 9 Am. Rep. 65, the same rule is declared, as follows: "When property, real or personal, is destroyed by fire, the loss falls upon the party who is the ²⁴¹ owner at the time, and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money": See, also, *Steamboat Wellsville v. Geisse*, 3 Ohio St. 337.

There are many other cases where the same doctrine is announced, but it will not be necessary to cite them here, as this court is fully committed to the doctrine that where a contract is entire, as is the case here, and the property has been destroyed by fire without the fault of either before the contract has been fully performed, no recovery can be had. Thus, in *Siegel v.*

Eaton etc. Co., 165 Ill. 550, 557, in the discussion of the question it is said: "We think the law is, that where a contract is entered into with reference to the existence of a particular thing, and that thing is destroyed before the time for the performance of the contract, without the fault of either party, both parties are excused from performing the contract, but neither is entitled to recover anything for a part performance thereof."

Under the rule announced in the case last cited, it is apparent no recovery could be had here. Appellant, by the contract, was to put in and complete the ventilating system for thirteen hundred and sixty dollars, payment of the entire sum to be made thirty days after the work was completed. Before the work was completed, as shown before, the building where the work was being done was destroyed by fire without the fault of either party. The contract was entire, and no recovery could be had by appellant unless it fulfilled the contract, which was never done.

The judgment of the appellate court will be affirmed.

Entirety of Contracts—Complete Performance, when Essential to a Cause of Action *ex Contractu*.*

It is, undoubtedly, the law, as we shall show farther on in this note, that there can be no recovery on a contract to do an entire piece of work for a specific sum unless the work is performed; and it is evident that, when a conclusion is reached as to what constitutes an "entire" contract, there is little left for a court to consider in determining the plaintiffs' right to recover. We shall, therefore, introduce our subject by first considering what constitutes an "entire contract," as well as what constitutes a divisible contract.

Entire Contracts.—An entire contract is indivisible. The whole must stand or fall together: *Norris v. Harris*, 15 Cal. 226. If the consideration of a contract is single the contract is entire, whatever the number or variety of the items embraced in its subject: *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Diboll v. Minott*, 9 Iowa, 403; *Fullmer v. Poust*, 155 Pa. St. 275; 35 Am. St. Rep. 881; *Rugg v. Moore*, 110 Pa. St. 236; *McClurg v. Price*, 59 Pa. St. 420; 98 Am. Dec. 356. The principle by which the courts are governed when they declare that a contract about several things, but with a single consideration in gross, is entire and not severable, is that it is impossible to affirm that the party making the contract would have consented to do so unless he had supposed that the rights to be acquired thereunder would extend to all the things in question: *Coleman v. Insurance Co.*, 49 Ohio St. 310; 34 Am. St. Rep. 565. And the tendency of modern decisions is to introduce more equitable rules, for the purpose

* REFERENCES TO MONOGRAPHIC NOTES.

Quantum meruit under special contract: 19 Am. Dec. 272-282.

What authorizes rescission by employer of contract of service: 31 Am. Rep. 100-104.

Rescission of contract by act of God or inevitable accident: 33 Am. Rep. 208-212.

of carrying out the intention of the parties, and construing agreements as dependent when possible: *King Philip Mills v. Slater*, 12 R. I. 82; 34 Am. Rep. 603.

The entirety of a contract, therefore, depends upon the intention of the parties, as well as upon the fact that the consideration is single; and the divisibility of the subject matter, or the mode of measuring the price, does not affect the question. The covenants of an entire contract are, of course, mutual and dependent; and covenants are to be considered dependent or independent, according to the intention and meaning of the parties, to be deduced from the terms of the whole instrument and the good sense of the case, without regard to technicalities, or the collocation of the several stipulations. In other words, whether a contract is entire or separable into several independent contracts, depends upon the intention of the parties, to be ascertained from the language employed and the subject matter of the contract: *Pollak v. Brush Electric Assn.*, 128 U. S. 446; *Morris v. Wibaux*, 159 Ill. 627; note to *Champlin v. Rowley*, 18 Wend. 194; *State v. Jones*, 21 Nev. 510; *Southwell v. Beezley*, 5 Or. 458; *More v. Bonnet*, 40 Cal. 251; 6 Am. Rep. 621; *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Hutchens v. Sutherland*, 22 Nev. 363; *Shinn v. Bodine*, 60 Pa. St. 182; 100 Am. Dec. 560; *Tipton v. Feltner*, 20 N. Y. 423; *Quigley v. De Haas*, 82 Pa. St. 267.

A contract by which one of the parties binds himself not to engage in a particular business or occupation "in the city and county of San Francisco, or state of California," is entire, and cannot be severed so as to enforce that portion relating to the city and county of San Francisco, and reject that relating to the state of California: *More v. Bonnet*, 40 Cal. 251; 6 Am. Rep. 621. A purchase at an auction constitutes an entire contract: *Tompkins v. Haas*, 2 Pa. St. 74. A contract for the future delivery of certain quantities of steel slabs and billets, in fixed installments, at stipulated times, payment to be made after each delivery, is an entire and not a separable contract: *Clark v. Wheeling Steel Works*, 53 Fed. Rep. 494. An oral contract by which a person sells his own chattels or choses in action, payment and delivery being made, and agreeing to take them back from and to repay the purchase price to the purchaser on demand, is an entire contract: *Johnston v. Trask*, 116 N. Y. 136; 15 Am. St. Rep. 394. A contract for the sale of several distinct things, as for the sale of a town lot and personal property, but all for one consideration, is an entire contract, and not divisible except by the consent of both parties thereto and the making of a new contract: *Scheland v. Erpelding* 6 Or. 259. So a contract to sell two bales of cotton to be ginned and baled, one at eighty cents in the currency of Tennessee, and the other at sixty cents in greenbacks, is not severable at the option of the buyer, but is an entire contract: *Barker v. Reagan*, 4 Helsk. 590. In a contract for the delivery of five thousand tons of ore at ten dollars per ton, the buyer to pay for a certain number of tons per month, there was no stipulation as to the number of tons to be delivered each month or as to when the delivery should be completed. The first payment was made before any ore was delivered, but certain future payments were withheld, not because the payments had

not become due by reason of nondelivery of ore, but on the ground that the quality of ore was inferior. Under these circumstances, the contract was held to be entire: *West Republic Min. Co. v. Jones*, 108 Pa. St. 55. An agreement by brokers to purchase for a customer a certain amount of mortgaged bonds, and to take them off his hands at what they cost him, at any time when he should wish to get rid of them, is an entire contract, and the purchaser may compel the brokers to take such bonds from him and repay him the purchase price thereof: *Johnston v. Trask*, 116 N. Y. 136; 15 Am. St. Rep. 394.

Other illustrations of entire contracts will be found in the following cases: *State v. Jones*, 21 Nev. 510; *Shinn v. Bodine*, 60 Pa. St. 182; 100 Am. Dec. 560; *Barrie v. Earle*, 143 Mass. 1; 58 Am. Rep. 126; *Madden v. Smith*, 28 Kan. 798; *Hulse v. Bonsack Machine Co.*, 65 Fed. Rep. 864; *Fletcher v. Arnett*, 4 S. Dak. 615; *Cockley v. Brucker*, 54 Ohio St. 214.

Divisible Contracts. — If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied under the law, such a contract will generally be held to be severable: *Fullmer v. Poust*, 155 Pa. St. 275; 35 Am. St. Rep. 881; *Lucasco Oil Co. v. Brewer*, 66 Pa. St. 351; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343; *Quigley v. De Haas*, 82 Pa. St. 267; *Rugg v. Moore*, 110 Pa. St. 236; *More v. Bonnet*, 40 Cal. 251; 6 Am. Rep. 621; *Dibol v. Minott*, 9 Iowa, 403; but the conditions stated in this rule do not override the clear intention of the parties, if such intention can be gathered from the whole subject matter of the contract: *Quigley v. De Haas*, 82 Pa. St. 267; *Maryland Fertilizing etc. Co. v. Lorentz*, 44 Md. 218. Whether stipulations in a contract are conditions precedent to the right to enforce performance is to be determined by the intention of the parties, derived from the contract itself, by the application of common sense to each particular case, rather than by technical rules of construction: *Leonard v. Dyer*, 26 Conn. 172; 68 Am. Dec. 382. If a contract, although contained in the same instrument, is severable into distinct and independent contracts, a breach of one of these contracts does not constitute a breach of another: *Hutchens v. Sutherland*, 22 Nev. 363.

If acts, stipulated in a contract to be done, are to be done at different times, the covenants are to be construed as independent of each other: *Goldsborough v. Orr*, 8 Wheat. 217. A contract is in its nature divisible where it is to transport a certain quantity of lumber to a certain place at a certain price per thousand feet: *Leonard v. Dyer*, 26 Conn. 172; 68 Am. Dec. 382. A contract to deliver fifty thousand tons of coal in a year, the shipments to be made at the rate of six thousand tons per month, at the buyer's option, upon notices to be furnished on a certain day in each month for the quantity required during the succeeding month is severable: *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231; 83 Am. Rep. 753. A contract by a dairyman to furnish another person all of the former's milk for a year, at a certain price per gallon, is severable where no specific amount of milk is mentioned. The dairyman can, therefore, recover for milk furnished during a portion of the year, although he breaks

his contract as to the remainder of the year: *McLaughlin v. Hess*, 164 Pa. St. 570. A contract to cut and deliver at the mill of another one million feet of merchantable logs within the year, at four dollars and twenty-five cents per thousand feet, to be scaled, and received as each one hundred thousand feet are placed in a certain creek, is a severable contract: *Tenny v. Mulvaney*, 8 Or. 129. A contract to ship fifteen carloads of potatoes, while entire in the sense that either party has a right to full performance, is, nevertheless, separable, where it clearly appears that the shipments are to be made in carlots, to be paid for as received: *Williams v. Robb*, 104 Mich. 242. An order for different articles, if the quantity, description, and price of each is separately specified, is severable, so that the purchaser, upon receipt of the goods, may retain those which comply with the contract and reject those which do not: *Potsdamer v. Kruse*, 57 Minn. 103; *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831. As to when covenants to pay money for goods sold and delivered are independent of covenants to transfer certificates of stock in a corporation, see *Pollak v. Brush Electric Assn.*, 128 U. S. 446. A contract to deliver thirty tons of starch per year for two years, while entire in its terms, is yet divisible in its character; and, at the expiration of the first year, there may be a recovery for a breach of that portion of the contract that is to be performed during that year: *Mixer v. Williams*, 17 Vt. 457. A contract to do several things at several times is divisible in its nature, and a recovery may be had for every default: *Badger v. Titcomb*, 15 Pick. 409; 26 Am. Dec. 611. If a contract for board at an agreed price per week is not for a specified time beyond one week, it is terminable at the end of any week. The contract is, therefore, not entire except for one week, and the boarder is entitled to a deduction for an absence extending one or more weeks: *Greene v. Lavander*, 59 Vt. 465. A by-law of a fraternal organization providing for the payment of a definite sum for each week that any member is sick or disabled, so as to be unable to gain a livelihood, is, in its nature, a severable and not an entire contract, and each default is a separate cause of action: *Robinson v. Exempt Fire Co.*, 103 Cal. 1; 42 Am. St. Rep. 93. If one buys mining property of another, agreeing to pay therefor a certain proportion of the net proceeds of the mines, and to employ the vendor as superintendent at a salary payable monthly, the contracts are separable, and the vendor's discharge though wrongful is no breach of the contract concerning the net proceeds: *Hutchens v. Sutherland*, 22 Nev. 363.

A contract is generally severable which clearly apportions the payment to different parts of the work, although the work may be, in its nature, single and entire: *Siegel etc. Co. v. Eaton etc. Co.*, 165 Ill. 550; or if it appears from the terms of the contract that the parties did not intend to make the entire performance of it a condition precedent to receiving or being entitled to a ratable compensation for a part of the work actually done: *Jackson v. Cleveland*, 15 Wis. 107. So, if a contract for putting an elevator in a building provides that one-half of the payment therefor shall be made when the engine is on its foundation and final payment upon completion of the work,

the contract is severable, and the contractor may recover the part payment agreed to be made, if the building is destroyed by fire after the engine is on the foundation: Siegel etc. Co. v. Eaton etc. Co., 165 Ill. 550. Other illustrations of divisible contracts will be found in the following cases: Allen v. Brown, 43 Ga. 305; Goddard v. Barnard, 16 Gray, 205; Bower v. Bagley, 9 Wash. 642; Engle v. White, 104 Mich. 15; Berryman v. Hewit, 6 J. J. Marsh. 462; Loud v. Pomona Land etc. Co., 153 U. S. 564; Skillman Hardware Co. v. Davis, 53 N. J. L. 144; Bowers Granite Co. v. Farrell, 66 Vt. 314; McDaniels v. Whitney, 38 Iowa, 60.

Full Performance of Entire Contracts, Generally.—Part performance of an entire contract need not be accepted: McGehee v. Hill, 4 Port. 170; 20 Am. Dec. 277; and things improbable in a contract must be performed, although a thing impossible may sometimes be excused: Superintendent etc. of Schools v. Bennett, 27 N. J. L. 513; 72 Am. Dec. 373. There is no obligation to pay until the complete performance of an entire contract: Crane v. Knubel, 2 Jones & S. 443, 455; 43 How. Pr. 389, 393. Conditions precedent must be performed before there can be a recovery on an entire contract: Dermott v. Jones, 23 How. 220; 2 Wall. 1; People's Bank v. Mitchell, 73 N. Y. 406, 413; and a condition precedent prevails over the equity of the case: Maloney v. Rust, 42 Conn. 236, 243. It is a well-established rule that, if a party by his own contract creates a duty, or imposes a charge, upon himself, he must, under any and all circumstances, substantially comply with his undertaking. To excuse a performance his contract must provide for it: Bacon v. Cobb, 45 Ill. 47; Dermott v. Jones, 23 How. 220; 2 Wall. 1. He must do as he has contracted to do: Summers v. Hibbard, 153 Ill. 102; 46 Am. St. Rep. 872; Anderson v. May, 50 Minn. 280; 36 Am. St. Rep. 642; Adams v. Nichols, 19 Pick. 275; 31 Am. Dec. 137, and note; Harmony v. Bingham, 12 N. Y. 99; 62 Am. Dec. 142, and note; Coles v. Celluloid Mfg. Co., 30 N. J. L. 326. In speaking of the sanctity of contracts, Mr. Justice Swayne says, in Dermott v. Jones, 2 Wall. 8, that: "It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

An act of God or inevitable accident, does not, as we understand, excuse the nonperformance of a contract, wherein there is no provision made for such contingencies, though it is otherwise as to a duty imposed upon one by law: Adams v. Nichols, 19 Pick. 275; 31 Am. Dec. 137; Summers v. Hibbard, 153 Ill. 102; 46 Am. St. Rep. 872; Anderson v. May, 50 Minn. 280; 36 Am. St. Rep. 642; Harmony v. Bingham, 12 N. Y. 99; 62 Am. Dec. 142, and note; Smoot's case, 15 Wall. 36; note to People v. Manning, 18 Am. Dec. 453; Steele v. Buck, 61 Ill. 343; 14 Am. Rep. 60; Superintendent etc. of Schools v. Bennett, 27 N. J. L. 513; 72 Am. Dec. 373; School Dist. v. Dauchy, 25 Conn. 330; 68 Am. Dec. 371; Eugster v. West, 35 La. Ann. 119; 48 Am. Rep. 232; Mutual etc. Assn. v. Hillyard, 37

N. J. L. 444, 483; 8 Am. Rep. 741. Contra, Singleton v. Carroll, 6 J. J. Marsh, 527; 22 Am. Dec. 95; Smith v. Durell, 16 N. H. 344; 41 Am. Dec. 732; Parker v. Macomber, 17 R. I. 674; Doster v. Brown, 25 Ga. 24; 71 Am. Dec. 153; Janes v. Scott, 59 Pa. St. 178; 98 Am. Dec. 328; note to Wolfe v. Howes, 75 Am. Dec. 393. But even conceding that an act of God does excuse performance, we do not understand that it authorizes a recovery upon a contract that has not been performed. Otherwise stated, an act of God, even if it does excuse performance, does not entitle either party to recover for a part performance of the contract: Siegel etc. Co. v. Eaton etc. Co., 165 Ill. 550; Appleby v. Myers, L. R. 2 Com. P. 651; Tait v. New York etc. Ins. Co., 1 Flip. 288. Compare Doster v. Brown, 25 Ga. 24; 71 Am. Dec. 153; note to Wolfe v. Howes, 75 Am. Dec. 393. The performance of conditions subsequent is, however, excused, if it is impossible or becomes impossible by act of God: People v. Kingston etc. Road Co., 23 Wend. 193; 35 Am. Dec. 551; but when a party, by his own express contract, engages to do an act, any subsequent casualty, even though inevitable, does not relieve him from its performance, or from making the other party good if performance becomes impossible: Note to Harmony v. Bingham, 62 Am. Dec. 151, and numerous New York cases there cited. If one contracts to do a thing which is possible in itself, or when it is conditioned on any event which happens, the promisor is liable for a breach thereof, notwithstanding it is beyond his power to perform it. But an exception to this rule exists when the contract is made on the assumed continued existence of a particular person or thing, and such person or thing ceases to exist: Anderson v. May, 50 Minn. 280; 36 Am. St. Rep. 642. Compare Dickey v. Linscott, 20 Me. 453; 37 Am. Dec. 66.

The general rule of law gleaned from the cases is, that while a special contract remains open or unperformed, the one whose part of it has not been performed cannot recover for what he has done until the whole contract is completed. But there are exceptions to this rule, namely, where something has been done under the contract, though not in strict accordance with it, and where the other party derives a benefit from the labor done, in which cases the law implies a promise on his part to pay such a remuneration as the work is worth, which may be recovered in the proper form of action: Dermott v. Jones, 23 How. 220; 2 Wall. 1. That there can be no recovery on an entire contract until the whole contract is performed, except where performance is prevented or waived by the other party, see Appleby v. Myers, L. R. 2 Com. P. 651; Dermott v. Jones, 23 How. 220; 2 Wall. 1; McOlurg v. Price, 59 Pa. St. 420; 98 Am. Dec. 356; King v. Mason, 42 Ill. 223; 89 Am. Dec. 428; Smith v. Brady, 17 N. Y. 173; 72 Am. Dec. 442, and note; Oakley v. Morton, 11 N. Y. 25; 62 Am. Dec. 49, and note showing that conditions precedent must be strictly performed to entitle a party to recover: Miller v. Goddard, 84 Me. 102; 56 Am. Dec. 638; Ketchum v. Evertson, 13 Johns. 359; 7 Am. Dec. 384; Helm v. Wilson, 4 Mo. 41; 28 Am. Dec. 836; Hoare v. Rennie, 5 Hurl. & N. 19; Fletcher v. Arnett, 4 S. Dak. 615; Hartman

v. Meighan, 171 Pa. St. 46; Anderson v. May, 50 Minn. 280; 36 Am. St. Rep. 642; Burns v. Fairmont, 28 Neb. 866, 873; Steele v. Buck, 61 Ill. 343; 14 Am. Rep. 60; White v. Brown, 2 Jones, 403; Niblett v. Herring, 4 Jones, 262; Russell v. Stewart, 64 N. C. 487; Pullen v. Green, 75 N. C. 215; Thigpen v. Leigh, 83 N. C. 47; Lawrence v. Hester, 93 N. C. 79; People's Bank v. Mitchell, 73 N. Y. 406, 413.

This means, of course, that there can be no recovery, either upon the contract itself or upon a quantum meruit until full performance: Leonard v. Dyer, 26 Conn. 172; 68 Am. Dec. 382; Smith v. Davis, 1 Wis. 447; 60 Am. Dec. 390; Winstead v. Reid, Busb. 76; 57 Am. Dec. 571; Helm v. Wilson, 4 Mo. 41; 28 Am. Dec. 336; Marshall v. Jones, 11 Me. 54; 25 Am. Dec. 260; Morford v. Mastin, 6 T. B. Mon. 609; 17 Am. Dec. 168; Jennings v. Camp, 13 Johns. 94; 7 Am. Dec. 367; Morrow v. Board of Education, 7 S. Dak. 553; Brewer v. Tysor, 3 Jones, 180; Lawrence v. Hester, 93 N. C. 79. And this is so because, if a contract is entire, a full performance is a condition precedent to the plaintiff's right of action: Jennings v. Camp, 13 Johns. 94; 7 Am. Dec. 367; Winstead v. Reid, Busb. 76; 57 Am. Dec. 571. One cannot be subjected by garnishment to pay a quantum meruit on work already performed by the defendant, as he has a right to insist upon the entire performance of the work: Smith v. Davis, 1 Wis. 447; 60 Am. Dec. 390. But, while a party in default on an entire contract, under which compensation depends upon full performance, cannot recover for part performance either on the contract itself, or in general assumpsit, the question in every case is whether such intention is expressed in the contract; and, where such intention would seem to be contrary to the equity of the case, it should be clearly and precisely expressed before the court will enforce it: Leonard v. Dyer, 26 Conn. 172; 68 Am. Dec. 382. Indebitatus assumpsit may be maintained by a party who has fully discharged the stipulations of a written contract; but where his performance is incomplete, he is driven to his action upon the contract itself, with averments excusing his nonperformance: Eckel v. Murphey, 15 Pa. St. 488; 53 Am. Dec. 607.

Preventing Performance of Entire Contract gives a right of recovery. Otherwise expressed, a party to a contract, who has performed part of it according to its terms, and is prevented, by the other party from performing or completing the contract may recover compensation for the work performed, and materials furnished: Chicago v. Tilley, 103 U. S. 146; Lovell v. St. Louis etc. Ins. Co., 111 U. S. 264; United States v. Peck, 102 U. S. 64; Hartman v. Meighan, 171 Pa. St. 46; Dolan v. Rogers, 149 N. Y. 489; Caldwell v. Myers, 2 S. Dak. 506; Keyser v. Rehberg, 16 Mont. 331; Adams v. Burbank, 103 Cal. 646; Joyce v. White, 95 Cal. 236; Helm v. Wilson, 4 Mo. 41; 28 Am. Dec. 336; Rankin v. Darnell, 11 B. Mon. 80; 52 Am. Dec. 557; Patterson v. Gage, 23 Vt. 558; 56 Am. Dec. 96.

Quantum Meruit or Quantum Valebat.—The exception to the rule that there can be no recovery on a contract to do an entire piece of work for a specified sum unless the work is done may be stated —

thus: If one has entered into a special contract to perform work for another and to furnish materials, and the work is done, and the materials are furnished, but not in the manner stipulated, so that he cannot recover on the contract, yet if the work and materials are used by, or are of any benefit to, the other party, a recovery may be had on a quantum meruit for the work and a quantum valebat for the materials, although there has been no acceptance of the work: *Hayward v. Leonard*, 7 Pick. 181; 19 Am. Dec. 269, and monographic note thereto discussing quantum meruit under special contract; *Aetna Iron etc. Works v. Kossuth County*, 79 Iowa, 40; *Gallagher v. Sharpless*, 134 Pa. St. 134; *Kirkland v. Oates*, 25 Ala. 465; *Baeder v. Carnle*, 44 N. J. L. 208; *Katz v. Bedford*, 77 Cal. 819; *Steeple v. Newton*, 7 Or. 110; 33 Am. Rep. 705; *Brackett v. Morse*, 23 Vt. 554; *Phelps v. Sheldon*, 13 Pick. 50; 23 Am. Dec. 659; *Wolfe v. Howes*, 20 N. Y. 197; 75 Am. Dec. 388. If one honestly endeavors to perform an entire contract, and substantially performs it, and the party with whom the contract is made gets the benefit of the former's labor and materials, a failure to perform completely is a defense only to the extent of the damages suffered by the failure of complete performance: *Gallagher v. Sharpless*, 134 Pa. St. 134. In some of the cases more is required, and it has been held that the circumstances must be such that a new contract may be implied from the contract of the parties to pay a compensation for the partial or substituted performance, and that the mere fact of the partial performance being beneficial to a party is not enough from which to imply a promise to pay for it: *Elliott v. Coldwell*, 43 Minn. 357.

A much stronger case is, of course, made where acceptance has been added to benefit. Hence, if there has been only a part performance of an entire contract, or performance in a different way from that contracted for, which leaves the contract open and unperformed, yet, if the other party accepts such performance by using the subject matter of the contract, and it is of value to him, there may be a recovery therefor: *Florence Gas etc. Co. v. Hanby*, 101 Ala. 15; *Simpson v. Carolina Cent. R. R. Co.*, 112 N. C. 703.

The rule that a party who has failed to fully perform his contract cannot recover for part performance applies only to entire, and not to severable, contracts, which are, in legal effect, independent agreements about different subjects although made at the same time: *McGrath v. Cannon*, 55 Minn. 457. We shall, therefore, simply say that there may be a recovery, for a part performance of a divisible contract, either on that part of the contract performed or on a quantum meruit, before the whole thereof is performed: *Sykes v. St. Cloud*, 60 Minn. 442; *Coe v. Smith*, 4 Ind. 79; 58 Am. Dec. 618, and note; *Scofield v. Grow*, 63 Vt. 283; *Hollis v. Chapman*, 36 Tex. 1; *Edgerton v. Power*, 18 Mont. 353; *Spear v. Snider*, 29 Minn. 463; *Hindrey v. Williams*, 9 Col. 371. Apportionment of contracts is discussed in the note to *Coe v. Smith*, 58 Am. Dec. 622, and in the monographic note to *Cuthbert v. Kuhn*, 31 Am. Dec. 518-522, on ap-

portionment. The apportionability of contracts is the settled law of Texas: *Hollis v. Chapman*, 36 Tex. 1, 5; *Carroll v. Welch*, 26 Tex. 147. The actual value of labor done under a special contract which has been waived by the parties or been substantially performed may, of course, be recovered: *Newman v. McGregor*, 5 Ohio, 349; 24 Am. Dec. 293.

Building and Analogous Contracts.—The principles of contracts above discussed have often been applied to building contracts, and others of a like nature; and the rule, subject to exceptions hereafter to be noticed, is that if, by the terms of an entire contract, the plaintiff is to build a house for the defendant within a given time, and for a gross sum, he cannot recover anything, either upon the special contract, or upon a quantum meruit, until full performance on his part. In such cases, performance is to precede payment and is the condition thereof; and the fact that the structure is accidentally destroyed by fire or otherwise, just before its completion, and without the fault of either party, does not change the rule. There can be no recovery before an acceptance of what has been done: *Lawing v. Kintles*, 97 N. C. 350; *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 433; *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442; *Adams v. Nichols*, 19 Pick. 275; 31 Am. Dec. 137; *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *Schwartz v. Saunders*, 46 Ill. 18, 22; *Lumber Company v. Purdum*, 41 Ohio St. 373; *Kirkland v. Oates*, 25 Ala. 465; *Elliott v. Caldwell*, 43 Minn. 357; *Dermott v. Jones*, 23 How. 220; 2 Wall. 1; *Chase v. Hatch*, 4 Robt. 89; 3 Abb. Pr., N. S., 65. And the same rule applies to a contract under which materials are to be furnished or put into a building where it is destroyed by fire, or otherwise, before the contract is fully performed. The loss falls upon the contractor, and not upon the owner. for a contract to furnish materials and perform work in the construction of a building is an entirety, and no part of the work is regarded as being done, or material as being furnished, until the whole contract is complete: *Derrickson v. Edwards*, 29 N. J. L. 468; 80 Am. Dec. 220; *Galyon v. Ketchen*, 85 Tenn. 55. But, under special terms of the contract, the loss may sometimes be thrown upon the owner: See *Cook v. McCabe*, 53 Wis. 250; 40 Am. Rep. 765.

A contract to build a house, in which it is stipulated that the entire work is to be completed before any part of the compensation is demandable, is an entire contract. A workman can recover nothing under an entire contract for the building of a house, which is destroyed by fire before its completion; but it is otherwise if the contract is not entire: *Clark v. Collier*, 100 Cal. 256; *Partridge v. Forsyth*, 29 Ala. 200. And a contract to erect a house for the cost of the labor and material, with a certain per cent of the total cost added as compensation to the contractors, payments to be made as the work progresses and the balance on completion, is entire, although there is no specific sum mentioned as the contract price: *Grace v. Oakland Bldg. Assn.*, 106 Ill. 637. The payment of money, by installments, for the convenience of the contractor does not neces-

sarily affect the entirety of his contract to build and deliver a complete house. Hence, if the building is destroyed by fire, before its completion, he cannot recover an installment not due him: *Lumber Co. v. Purdum*, 41 Ohio St. 373. On the other hand, if it is expressly provided in the contract that the last installment is not to be paid until the completion of the building, it cannot be recovered where the whole work is consumed by fire, without apparent fault of either party, before its completion: *Clark v. Collier*, 100 Cal. 256. In this case, the plaintiff agreed to repair an old house and to build a new addition thereto to be attached to it. The old house was to be turned partly around, removed from its old foundation, and placed on a new brick foundation, to be laid under both the old house and the new addition. There was nothing in the contract by which the price to be paid for any part of the work or materials could be distinguished from that to be paid for any other part. A provision in it that the third installment should be paid when the "building" was completed according to the agreement and specifications was construed as referring to the whole building, including the old part and the new addition, and the contract was therefore held to be an entirety: *Clark v. Collier*, 100 Cal. 256.

A contract to erect a building for a certain price, payable in installments, is an entire contract; and a destruction thereof by fault of the builder or inevitable accident gives the owner a right to recover all installments paid: *Superintendent etc. of Schools v. Bennett*, 27 N. J. L. 513; 72 Am. Dec. 373. So the destruction, by fire, of a house which was being built under contract does not relieve the contractor from liability to an action for money advanced upon the contract, and damages for its nonperformance, although, at the time of the fire, he had substantially performed his contract, if the house has not been completely finished and delivered: *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349, and note. Again, a latent defect in soil does not excuse a contractor from erecting a house which he has covenanted to build: *Superintendent etc. of Schools v. Bennett*, 27 N. J. L. 513; 72 Am. Dec. 373; *Dermott v. Jones*, 23 How. 220; 2 Wall. 1. Therefore, if he agrees to build a house for another on the soil of such person, and to deliver it to the owner, finished and ready for occupation at a day named, his performance of the contract is not excused by the fact that there was a latent defect in the soil, which caused the walls to sink and crack, and the house to become dangerous and uninhabitable, thereby rendering it necessary to take down a part of the house and rebuild it on artificial foundations: *Dermott v. Jones*, 23 How. 220; 2 Wall. 1.

One party to a building contract cannot be compelled to accept work not performed according to the specifications, and to rely on recoupment for his indemnity: *Martus v. Houck*, 81 Mich. 439; 83 Am. Rep. 409; and it is a good defense, in an action for work and labor done, in the building of a house upon another's land, that the work was done in such a negligent, unskillful, and unworkmanlike

manner as to be of little or no value to the owner of the premises: *Pullman v. Corning*, 9 N. Y. 83. Upon the same principle, if the owner of a house and land agrees to sell and convey it, upon the payment of a certain price which the purchaser agrees to pay, and before full payment, the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money. Therefore, where the plaintiff contracted to sell and convey to defendant a farm having buildings thereon, and to deliver a deed in "fee simple of said premises," upon the payment, by defendant on a day named, of the price stipulated, and before the day named and the tender by the plaintiff of the deed, the buildings on the premises were burned, and the value of the premises greatly reduced thereby, it was held that the plaintiff could not maintain an action upon the contract: *Wells v. Calnan*, 107 Mass. 514; 9 Am. Rep. 65.

As exceptions to the rule that there can be no recovery upon a building contract until the work is done according to agreement, it may be stated that the general rule does not apply where unfinished work has been accepted, or has been used by, and is of benefit to, one of the parties, and that a recovery may be had upon a divisible building contract. Thus, if the owner clearly accepts the property when nearly, but not entirely, completed, any loss occurring thereafter must fall upon him: *Galyon v. Ketchen*, 85 Tenn. 55; for where the owner has accepted the building in its approximately completed condition, and is using it for the objects for which it was built, the law implies a promise on his part to pay what the work done is reasonably worth: *Florence Gas etc. Co. v. Hanby*, 101 Ala. 15; *Gonzales College v. McHugh*, 21 Tex. 257; *Hayward v. Leonard*, 7 Pick. 181; 19 Am. Dec. 268. The question of acceptance, however, is a very delicate one. The mere fact of an owner's taking possession of his own land on which buildings have been erected, or where repairs have been done or alterations made to a building thereon, does not afford an inference that he has dispensed with the conditions of a special agreement under which they were built, or of a contract to pay for the work actually done according to measure and value: *Munro v. Butt*, 8 Hl. & B. 738. A builder cannot recover unless he has complied with his contract, and it is held in New York that this is true although the defendant has taken possession of and uses the building, as this is not necessarily a waiver of failure to comply with the conditions of the contract: *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442, and note citing many New York cases to the point that, where work is to be done, and performance is to precede payment, and is the condition thereof, the party failing to complete the work can recover nothing for his labor and materials, even though the other party has chosen to enjoy the fruits of the labor. So it is held that, where an article made immediately becomes a part of the realty, the use of it does not amount to an acceptance: *Morford v. Mastin*, 6 T. B. Mon. 600; 17 Am. Dec. 168.

In a Massachusetts case, there was a contract to repair a house and outbuildings for a certain sum, but when the repairs on the house were nearly completed, the owner, by his tenant, entered and occupied it, after which the house and outbuildings were destroyed by fire. In an action for work done and materials furnished, the workman was held entitled to recover for the repairs done on the house when the owner took possession. The court recognized the rule that one cannot recover on a contract to do an entire piece of work for a specific sum unless the work is done, and, therefore, carefully stated that "the precise ground on which the plaintiff can recover in this case is, that when the repairs upon the house were substantially done, and before the fire, the defendant, by his tenant, entered into and occupied it, and so used and enjoyed the labor and materials of the plaintiff; and that such use and enjoyment were a severance of the contract, and an acceptance, pro tanto, by the defendant: *Lord v. Wheeler*, 1 Gray, 282. To entitle a party to recover for part performance, or for performance in a different way from that contracted for, his contract remaining open and unperformed, it is sometimes held that the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial, or substituted performance, as the mere fact of partial performance being beneficial to a party is not enough from which to imply a promise to pay for it. Consequently, it is held that, if a builder fails to complete his contract to erect a house on another's land, or does not make the work substantially conform to the contract, the mere fact that the building remains on the land, and that the owner enjoys its benefits, he having no option to reject it, is not such an acceptance as will imply a promise to pay for it, in face of the fact that the special contract has not been performed: *Elliott v. Caldwell*, 43 Minn. 857.

As an exception to the general rule above stated, there have been cases allowing a recovery upon a building contract where it is divisible: *Haynes v. Second Baptist Church*, 88 Mo. 285; 57 Am. Rep. 413; *Partridge v. Forsyth*, 29 Ala. 200. If such a contract provides that the whole building shall be constructed for a certain sum, a specified portion of that sum to be paid upon the completion of the foundation walls, a second specified portion when the roof is on, a third specified amount when the plastering is completed, and the remainder when the house is completed, such payments are distinct and separate, and may be sued for as they mature: *Crawford v. McKinney*, 165 Pa. St. 605. A building contract which is not an absolute one to do work at all hazards, but is dependent upon assumed and implied conditions which the other party is to perform but does not perform, is severable to the extent that a mechanic may recover for work done up to the time that the building is destroyed by fire: *Haynes v. Second Baptist Church*, 88 Mo. 285; 57 Am. Rep. 413.

If performance of a building contract is prevented by acts of the other party, the contractor is entitled, of course, to recover the rea-

sonable value of the work performed and materials furnished: *Adams v. Burbank*, 103 Cal. 646; *Kirkland v. Oates*, 25 Ala. 465.

The doctrine that there can be no recovery on an entire building contract until the work is done, is not the law of Texas: *Hollis v. Chapman*, 86 Tex. 1, 5; *Carroll v. Welch*, 26 Tex. 147. It has been held there that under a contract to furnish materials and perform labor in altering an existing structure, according to agreed specifications, with no provision as to time of payment, if the structure is destroyed by fire, without the fault of either party, when the work has been only partly performed, the builder may recover quantum meruit: *Weis v. Devlin*, 67 Tex. 507; 60 Am. Rep. 38. So, in a Massachusetts case, a workman was allowed to recover for work done and materials furnished, under a contract to lath and plaster a building for a certain sum per square yard, although, after he had lathed the building and put on the first coat of plaster, the building was, without his fault, destroyed by fire: *Cleary v. Sohler*, 120 Mass. 210. We are unable to reconcile this case, as well as the Texas case, with the weight of authority upon the question under consideration, unless the fact that nothing was said in either case about the time of payment, takes them out of the general rule, we see no legal reason why it should. The case of *Cleary v. Sohler*, 120 Mass. 210, does not even appear to be supported by the authorities therein cited, namely, *Lord v. Wheeler*, 1 Gray, 282, and *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, discussed above. The case is disposed of in five lines, and appears to be ill-considered, and inconsistent with *Lord v. Wheeler*, 1 Gray, 282, where the specific ground of decision was acceptance and use of the property. And we cannot close this subdivision without adverting to the case of *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413, where the plaintiff contracted to make and put certain fixtures into the defendant's church, by a certain day, for a gross sum to be paid on completion and acceptance. After the work was partly done, and before the appointed day, the church was destroyed by fire without the fault of either party, and it was held that the plaintiff might recover quantum meruit. This case is opposed to the weight of authority, for the principle underlying all the English and American authorities on this subject is, as we understand it, that a party must perform his contract, and, if loss occurs by inevitable accident, the law will let it rest upon the party who has contracted that he will bear it. The rule is also just and founded in reason, for if he does not intend to bear the loss, it is natural to presume that he will stipulate against it. The well-recognized principle that, where one of two innocent persons must sustain a loss, the law casts the burden upon the party who agreed to sustain it, or rather leaves it where the parties, by their agreement, placed it, also applies in such cases: *Steele v. Buck*, 61 Ill. 343; 14 Am. Rep. 60.

Personal Services.—In accordance with the general rule we have stated one who contracts for a specified sum, to serve another for

a specified period, cannot recover anything, either on his contract or on a quantum meruit, for serving a less period, when he terminates his service without the fault or consent of his employer. In other words, there can be no recovery on an entire contract for personal services until they have been fully performed: *Mortmain v. Lefaux*, 6 Mart. 654; 12 Am. Dec. 485; *McMillan v. Vanderlip*, 12 Johns. 165; 7 Am. Dec. 299; *Hutchinson v. Wetmore*, 2 Cal. 310; 56 Am. Dec. 337; *Pennsylvania etc. Nav. Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 543; *Stark v. Parker*, 2 Pick. 267; 13 Am. Dec. 425; *Leopold v. Salkey*, 89 Ill. 412; 31 Am. Rep. 93, and note; *Galvin v. Prentice*, 45 N. Y. 162; 6 Am. Rep. 58; *Olmstead v. Beale*, 19 Pick. 528; *Jenkins v. Wheeler*, 37 How. Pr. 458, 472; 2 Abb. App. Dec. 442, 444; *Cutter v. Powell*, 6 Term Rep. 320. Contra, *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713.

And a contract of employment for a year for a certain sum per week, payable weekly, is entire and indivisible: *Olmstead v. Bach*, 78 Md. 132; 44 Am. St. Rep. 273. A contract to serve for three months, at an agreed salary per month, is entire, and if the service is left before the expiration of the three months no recovery can be had: *Wright v. Turner*, 1 Stew. 29; 18 Am. Dec. 35. So, a contract to pay a watchmaker twenty-five dollars per week "from the date of his commencement in our employ until the expiration of the year, meaning, of course, only to pay him for the time he serves us," is an entire contract to work for the remainder of the year, the reservation of weekly wages being only a mode of payment: *Tarbox v. Hartenstein*, 4 Baxt. 78. And a contract for an overseer's wages running thus: I agree to your conditions, namely one hundred dollars a month, which will be eleven hundred dollars for this year, one month having already elapsed, is an entire contract for the term and not by the month: *Miller v. Gidiere*, 36 La. Ann. 201. A contract is entire, and the value of a part of the services performed cannot be recovered by an employé who abandons the contract before its expiration without the employer's fault, where the employé agreed to labor for eight months, at a certain rate per month for himself and for his wife, the employer to give his note at the end of four months, payable at the expiration of the term of service, and until which time the wages of the last four months were not to be paid: *Hutchinson v. Wetmore*, 2 Cal. 310; 56 Am. Dec. 337. The plaintiff agreed, in writing, to serve the defendant for three years, as superintendent and manager of his manufactory of clothing, and to devote his whole time, attention, and skill thereto; and the defendant agreed to pay him therefor three thousand dollars a year, in equal monthly payments. The plaintiff, without fault on his part, was arrested and kept in jail for about a fortnight, during the busiest season and the defendant hired another person in his place. On being released, the plaintiff tendered his services, which the defendant refused. He had been paid in full for the time he actually worked. Under these circumstances, it was held that the plaintiff could not

maintain an action of damages for breach of the contract: *Leopold v. Salkey*, 39 Ill. 412; 31 Am. Rep. 93.

If a contract is entire, and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for part performance; although the contract itself is void by the statute of frauds. Hence, where the defendant hired the plaintiff, a boy without knowledge or skill in the hat business to work in his hat factory, stipulating verbally with him at a specified rate for three years' service, and the contract being void under the statute of frauds, it was held, in an action upon the quantum meruit, that the contract was not even prima facie evidence of the value of plaintiff's services: *Galvin v. Prentice*, 45 N. Y. 162; 6 Am. Rep. 58. A parol agreement to devise and bequeath real and personal property as compensation for a nephew's services is within the statute of frauds, as to the real estate, and, being indivisible, fails entirely; but it has been held that it may be shown in evidence to rebut the presumption that services were rendered gratuitously, and that the nephew may recover quantum meruit: *Estate of Kessler*, 87 Wis. 660; 41 Am. St. Rep. 74.

It is held in many cases, that, if one performs services for another on a special contract, and, for any reason except a voluntary abandonment, fails to fully comply with his contract, and the service and materials are of value to him for whom they were rendered and furnished, he may recover the reasonable value of such material and services, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure: *Gove v. Island City etc. Milling Co.*, 19 Or. 363; *Steeple v. Newton*, 7 Or. 110; 33 Am. Rep. 705; *Hillyard v. Crabtree*, 11 Tex. 264; 62 Am. Dec. 475; *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713; *Wolfe v. Howes*, 20 N. Y. 197; 75 Am. Dec. 388. A contract to do sixty dollars' worth of work for another is not so far entire that the plaintiff cannot recover anything without a full performance on his part: *Schofield v. Grow*, 63 Vt. 283. The recovery, however, on a quantum meruit under a special contract, especially for personal services is a troublesome question, and the authorities on the subject are conflicting. A discussion of the matter will be found in the monographic notes to *Hayward v. Leonard*, 19 Am. Dec. 272-282; *Leopold v. Salkey*, 31 Am. Rep. 100-103; *Dewey v. Alpena School Dist.*, 38 Am. Rep. 208-212.

Sales.—A party who binds himself to deliver personal property must do so before he can recover on his contract, unless the other party has clearly refused to receive it, or has become disabled to perform his part of the contract: *Smoot's case*, 15 Wall. 36. One who performs part of an entire contract of sale, and voluntarily and without excuse refuses to perform the remainder, cannot recover for the part performance: *Haslack v. Mayers*, 26 N. J. L. 284. A vendee is not compelled to accept part performance of a contract of

sale: *Pope v. Porter*, 102 N. Y. 866. Under an entire contract to deliver pork, the seller cannot recover for any of it until the whole has been delivered: *Dula v. Cowles*, 7 Jones, 290; 75 Am. Dec. 463. A vendor cannot recover the price of goods actually delivered, although they were received and used by the vendee, where, by the contract of sale the vendor was to deliver a certain quantity in each of three successive months, and the only quantity delivered was less than required by the contract: *Catlin v. Tobias*, 26 N. Y. 217; 84 Am. Dec. 183. Under a contract to grow, sell and deliver certain quantities of specified kinds of beans, a failure to deliver the entire quantity is not excused by an early unexpected frost destroying or injuring the crop to such an extent that the grower is unable to deliver the entire quantity from beans grown by him: *Anderson v. May*, 50 Minn. 280; 36 Am. St. Rep. 642. A contract for the sale of several distinct and separate items of property is entire if the promise by the purchaser is made conditional upon entire performance by the vendor: *Ming v. Corbin*, 142 N. Y. 834. If the things to be furnished by the vendor are certain and fixed, and are described in the contract of sale, and the consideration for the whole is single and entire, the contract is entire, and the seller, in an action thereon, can recover no part of the consideration, until all the things to be furnished are furnished. Therefore, a contract to sell a self-feeding threshing machine, consisting of an engine, separator, self-feeder, etc., for the sum of eighteen hundred and twenty-five dollars, is an entire contract, although it contains a provision that if the defective machinery cannot be made to fill the warranty, it may be returned, and, if the self-feeder fails to fill the warranty, the purchaser has a right to return the machine as not filling the warranty: *Kingman v. Meeks*, 56 Ill. App. 272. So a contract for the sale of coal, "f. o. b. cash, 30 days," to be shipped, a barge load immediately, the remainder in equal monthly proportions, before February, is not a severable contract, but an entire one; and, if the purchaser fails to take the proportions for the months preceding December, and shows no waiver by the seller of his right to insist on a cancellation of the contract for such failure, and no legal excuse therefor, he cannot recover for the sellers' refusal to make shipments for the months of December and January: *Providence Coal Co. v. Coxe*, R. I., February, 1896. A sale of nine slaves for a gross sum is an entire contract, where no means are afforded for determining the price of each one, and there is an implied agreement that all are to be taken or none: *Norris v. Harris*, 15 Cal. 226, 256. •

On the other hand, a contract made at the same time, for different articles, at different places, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such a failure been anticipated: *Norris v. Harris*, 15 Cal. 226, 256. If the price to be paid on a contract of sale

is apportioned to each item, or is left to be implied by law, the contract is severable, where the promise by the purchaser is not made conditional upon entire performance by the vendor. Hence, if the purchaser has received and accepted one of the items, it is no defense to an action to recover the purchase price that the other items have not been delivered. He is simply entitled to damages, if any, because of the nondelivery: *Ming v. Corbin*, 142 N. Y. 884. For example, if one agrees to deliver forthwith a quantity of dressed pork, for a certain price, and also to sell to the buyer, upon their arrival, at a different price, a number of live hogs, then on their way and expected in a few days, no stipulation being made as to the time of payment for either, and the pork is delivered but the live hogs are not, the price of the dressed pork may be recovered, subject to recoupment for damages caused by a failure to deliver the live hogs: *Tipton v. Feltner*, 20 N. Y. 423. A running account for goods sold, money lent, or money paid, at different times, is not an entire demand incapable of being divided for the purpose of bringing separate suits, unless there is an agreement to that effect: *Badger v. Titcomb*, 15 Pick. 409; 28 Am. Dec. 611.

Work Done and Materials Furnished.—If one agrees to do work for another, or to supply materials, for a specific sum, to be paid for upon the completion of the work, or the furnishing of the materials, the former is not entitled to recover anything, either upon his special contract, or upon a quantum meruit until the work is done or the materials furnished. This rule, however, is subject to exceptions hereafter noticed: *Appleby v. Myers*, L. R. 2 Com. P. 651; *Cohn v. Plumer*, 88 Wis. 622; *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470; *Gruetzner v. Ande Furniture Co.*, 28 Mo. App. 263; *Brumby v. Smith*, 3 Ala. 123; *Taft v. Montague*, 14 Mass. 281; 7 Am. Dec. 215; *McMillan v. Vanderlip*, 12 Johns. 165; 7 Am. Dec. 299. Thus, a carpenter who undertakes to repair a ship for a fixed price loses his materials and labor if the ship is destroyed before the work is finished: *Sequin v. Debon*, 3 Mart. 6; 5 Am. Dec. 735. The plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises with all the machinery and materials thereon were destroyed by an accidental fire; and it was held that, while both parties were excused from the further performance of the contract, the plaintiffs were not entitled to sue in respect to those portions of the work which had been completed, whether the materials used had become the property of the defendant or not: *Appleby v. Myers*, L. R. 2 Com. P. 651. For a similar case, see *Brumby v. Smith*, 3 Ala. 123. One agreeing to make certain articles, each to be paid for at a fixed price when finished, cannot voluntarily leave some of them in an unfinished state, and recover on a quantum meruit for the work done upon them: *Gruetzner v. Ande Furniture Co.*, 28 Mo. App. 263. So

one who agrees to furnish all the granite required for a certain building, according to the plans and specifications, for a stated sum, cannot recover on a quantum meruit if he fails to perform his contract: *Cohn v. Plumer*, 88 Wis. 622. And, if a contractor, having undertaken to erect a bridge for a town, in a particular manner, at an agreed price, does his work so unskillfully that the bridge, after being used for a time, falls down and is entirely useless, the town may resist a recovery, either upon the contract or upon a quantum meruit, and is not compelled to resort to a cross-action for damages: *Taft v. Montague*, 14 Mass. 281; 7 Am. Dec. 215. Contra, *Wadleigh v. Sutton*, 6 N. H. 15; 23 Am. Dec. 704, showing that one who has performed work for a town, though not in accordance with his contract, may recover on a quantum meruit whatever his labor is worth to the town: *Wadleigh v. Sutton*, 6 N. H. 15; 23 Am. Dec. 704.

The acceptance and use of work performed and materials furnished renders one answerable, of course, on an implied promise to pay for the value he has received to the amount whereby he is benefited, though the work done and materials furnished are not in the manner stipulated in a special contract therefor, and no action can be maintained on the same: *McKinney v. Springer*, 8 Ind. 59; 54 Am. Dec. 470; *Maloney v. Rust*, 42 Conn. 236. Another exception to the general rule is that a recovery may be had, before complete performance, on a severable contract, as where a party contracts to paint and glaze ten houses for the sum of seventy dollars each: *Dibol v. Minott*, 9 Iowa, 403. It has been held that a contract for work, providing for the payment of definite sums at different periods, before the completion of the entire work, is not an entire contract, but severable, and that suit may be brought upon it as the installments come due: *Keeler v. Clifford*, 62 Ill. App. 64. Contra, *Cox v. Western Pac. R. R. Co.*, 44 Cal. 18.

Various Other Kinds of Contracts.—The principle that there can be no recovery upon an entire contract until full performance thereof applies to other contracts than those above discussed. It applies to an entire contract to drain certain mining lands: *Brinkerhoff v. Elliott*, 43 Mo. App. 185; to deliver timber: *Stokes v. Baars*, 18 Fla. 656; to peel bark from timber: *Hartley v. Decker*, 89 Pa. St. 470; to cut timber: *Alcott v. Hugus*, 105 Pa. St. 350; to cut and haul saw-logs: *McDonald v. Bryant*, 73 Wis. 20; to furnish and put up machinery or to repair old machinery: *Butler v. Butler*, 77 N. Y. 472; 33 Am. Rep. 648; *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; to produce, by manufacture, or otherwise, a particular thing: *Anderson v. May*, 50 Minn. 280; 36 Am. St. Rep. 642; to procure a party to make an exchange of lands: *Rockwell v. Newton*, 44 Conn. 350; to find a purchaser for a farm: *Weber v. Clark*, 24 Minn. 354; to sell land: *Bank of Columbia v. Hagner*, 1 Pet. 455; to deliver attached property on demand: *Clark v. Sawyer*, 121 Mass. 224; to have a chartered vessel proceed from one port named to another port named: *Lowber v. Bangs*, 2 Wall. 728; to perform professional ser-

vices as an attorney: *Hartupée v. Crawford*, 56 Fed. Rep. 61; to carry freight: *Crawford v. Williams*, 1 Sneed, 205; 60 Am. Dec. 146; to recover rent for leased property: *McClurg v. Price*, 59 Pa. St. 420; 98 Am. Dec. 356; to store lime in a warehouse: *Archer v. McDonald*, 36 Hun, 194; to publish an advertisement on three different theater programs: *Hazzard v. Hoxsle*, 53 Hun, 417; to perform railroad construction work: *Jackson v. Cleveland*, 15 Wis. 107; to erect two spires upon a church building: *Parker v. Scott*, 82 Iowa, 266; to dig a well: *Janes v. Scott*, 59 Pa. St. 178; 98 Am. Dec. 328; *Simonds v. Pearce*, 31 Fed. Rep. 137; *Jackson v. Creswell*, 94 Iowa, 713, 715; and to sell and deliver hay; *Champlin v. Rowley*, 18 Wend. 187.

A contract, however, to cut, cure, and stack hay on a ranch may be severable: *Hindrey v. Williams*, 9 Colo. 371. So may a contract to dig a well: *Spear v. Snider*, 29 Minn. 463. If the owner of a five-story and basement building leases it at a rental of fifteen hundred dollars per year, payable quarterly, and gives the possession of the first three stories to the lessees, and agrees to give them possession of the remainder upon demand, which he afterward refuses to do, he cannot recover rent from the lessees for the use of the first three stories, as the contract must be regarded as an entirety: *McClurg v. Price*, 59 Pa. St. 420; 98 Am. Dec. 356. So one who, for a sum certain, agrees to find a purchaser for a farm, is not entitled to anything unless he finds a purchaser for the whole farm. It is not enough that he finds a buyer for a part of it: *Weber v. Clark*, 24 Minn. 354. If work is beneficial, however, there may be a recovery: *Maloney v. Rust*, 42 Conn. 236. Thus, if a party to a contract for building a dam, acting in good faith and intending to fulfill his contract, unintentionally fails in some particulars to perform it, he may recover from the other party to the contract so much as the labor and materials are worth to the latter, deducting from the contract price so much as the dam built by him is worth less than the dam contracted for: *Gleason v. Smith*, 9 Oush. 484; 57 Am. Dec. 62. So there may be a recovery upon a quantum valebat for materials furnished under an entire contract, where the unfulfilled contract is lawfully rescinded by the parties thereto: *Atlantic Coast Brewing Co. v. Donnelly*, 59 N. J. L. 48.

**SUPREME LODGE KNIGHTS AND LADIES OF HONOR v.
PORTINGALL.**

[167 ILLINOIS, 291.]

INSURANCE—MUTUAL BENEFIT SOCIETIES—PARTIES.
If one of the beneficiaries named in a certificate of insurance dies, the surviving beneficiaries may sue alone upon the certificate without joining the administrator of the deceased beneficiary.

Ashcraft, Gordon & Cox, for the appellant.

Francis T. Colby, for the appellees.

291 CARTER, J. This was an action of assumpsit, brought by Julia Portingall and George W. Portingall, minors, by their next friend, upon a beneficiary certificate for one thousand dollars issued to **292** their mother, Julia Portingall. By the certificate the money was payable to the three children of the assured—that is, to the plaintiffs and another, John S. Portingall, since deceased. The mother died October 26, 1889, and John S. Portingall died August 22, 1892, at the age of sixteen years. The declaration alleged that his funeral expenses had been paid, that he owed no debts, that no administrator of his estate had been appointed, and that the plaintiffs were his only heirs at law. In other respects it was in the ordinary form of such a pleading. The defendant abode by its demurrer, which had been overruled by the court, and judgment was rendered for the plaintiffs. The appellate court has affirmed the judgment.

The only point insisted upon by appellant in this court is, that the two surviving beneficiaries, suing alone, cannot recover, but that the administrator of the deceased beneficiary should have been joined as plaintiff. This defense is without merit. It is elementary law that “when one or more of several obligees, covenantees, partners, or others having a joint legal interest in the contract dies, the action must be brought in the name of the survivors, and the executor or administrator must not be joined”: 1 Chitty’s Pleading, *19; 7 Am. & Eng. Ency. of Law, 263, 361, notes; *Vandenheuval v. Storrs*, 3 Conn. 203. The rule has often been stated by this court as applied to defendants: *Eggleston v. Buck*, 31 Ill. 254; *Cummings v. People*, 50 Ill. 132; *Stevens v. Catlin*, 152 Ill. 56.

It is immaterial to the right of recovery in this action whether the administrator of the deceased beneficiary, if one were appointed, could recover from the others or not.

No error has been committed, and the judgment of the appellate court is affirmed.

THE LAW OF MUTUAL BENEFIT ASSOCIATIONS is quite fully discussed in the extended notes to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 781-791, and *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 543-578; but we find no case like the principal one, and the point there decided is undoubtedly one of rare occurrence.

MURRAY v. DOUD.

[167 ILLINOIS, 368.]

EVIDENCE OF CONTRACT.—"BOUGHT AND SOLD NOTES," executed by a broker, in the regular course of business, in negotiating a sale, are competent evidence of a contract.

BROKERS WITHOUT LICENSE—VALIDITY OF CONTRACTS OF.—A broker's transaction of business, without a license, in violation of a city ordinance, does not invalidate his contracts or affect their character as evidence.

BROKERS WITHOUT LICENSE—ACTION ON CONTRACTS MADE BY.—If a broker negotiates contracts without a license, in violation of a city ordinance, he may be prosecuted and fined, but this would not invalidate his contracts. Hence, the rule that an action cannot be maintained which is predicated on a transaction prohibited by statute has no application to such contracts.

APPEAL—REVERSAL OF JUDGMENT.—IMPROPER REMARKS OF COUNSEL, during an argument before the jury, do not, unless the court has made some erroneous ruling on the question, constitute a ground for reversal of judgment.

DAMAGES—BREACH OF CONTRACT TO BUY GOODS.—Upon a breach, by the buyer, of a contract to buy goods, the measure of damages is the difference between the contract price and the market price of the goods at the time of the breach.

DAMAGES—BREACH OF CONTRACT TO BUY GOODS—INTEREST.—"Bought and sold notes" constitute a written contract, and, upon the buyer's breach thereof to buy goods, the seller may recover legal interest on the amount of money found to be due.

Rufus King and Allen Story, for the appellant.

Peck, Miller & Starr, for the appellees.

370 CRAIG, J. This was an action brought by J. M. Doud & Co. against John J. Murray, on an alleged contract by plaintiffs to sell, and of defendant to buy, the product of leaf-lard 371 of the Doud packing-house from November 3, 1891, to January 1, 1892, at nine cents per pound. After the alleged contract was made, the price of lard declined on the market, and the defendant refused to receive six cars of lard, whereupon plaintiffs sold the lard on the market, and this action was brought to recover the difference between the contract price and the amount realized on a sale at the market price. On a trial before a jury the plaintiffs recovered a judgment for one thousand and eight-seven dollars and sixteen cents, which was affirmed in the appellate court.

On the trial in the superior court plaintiffs read in evidence the following "bought and sold notes":

"Chicago, Nov. 3, 1891.

"Bought of J. M. Doud & Co., Boone, Iowa (care of Lamson Bros., Bd. of Trade Bldg., Chicago), their entire production leaf from date to January 1, 1892, at nine cents, Chicago delivery. You are to receive the leaf f. o. b. teams at any city depot or at any warehouse at Union Stock Yards, in such lots as they may ship. In the event that either party should become incapacitated in manufacturing, by destruction of premises by fire, the sale to become null and void at such date. Goods to be in prime condition on arrival in Chicago. Terms cash.

"L. M. PRENTISS.

"To J. J. Murray & Co., Chicago."

"Chicago, Nov. 3, 1891.

"Sold to J. J. Murray & Co., Chicago, your entire production leaf from date to January 1, 1892, at nine cents, Chicago delivery. They are to take this leaf f. o. b. teams at city depot or at any warehouse at Union Stock Yards, in such lots as you may ship. They would like, however, that you ship in lots about 5,000 pounds, when convenient to do so. In the event that either party should become incapacitated in manufacturing, by destruction of premises by fire, the sale to become null and void at such date. Goods to be in prime condition for butterine purposes on arrival in Chicago. Terms cash.

"L. M. PRENTISS.

"To J. M. Doud & Co., Boone, Iowa (care Lamson Bros., Chicago)."

The defendant objected to the introduction of these documents in evidence, but the objection was overruled, and the decision of the court is relied upon as error.

³⁷² It appears from the evidence that L. M. Prentiss was a broker in Chicago. He testified: "I negotiated this sale November 3d, at Murray's office. He and I were present. I said to Murray I had this production for sale for two months at nine cents a pound. He accepted the purchase from November 3d to January 1st, at nine cents a pound." It further appears from his testimony that upon making the sale the "bought and sold notes" were made out and delivered to the respective parties. The law is well settled that "bought and sold notes" executed by a broker, like those in question, are competent evidence to establish a contract. Here, Prentiss was a broker. He was empowered to sell the leaf

lard that plaintiffs should produce during a specified period. He made the sale as he was authorized to do, and executed the 'bought and sold notes' as evidence of the transaction. Notes of this character have been fully sustained by this and other courts: *Saladin v. Mitchell*, 45 Ill. 79; *Memory v. Niepert*, 131 Ill. 623.

In *Saladin v. Mitchell*, 45 Ill. 79, 82, in the discussion of the question, the court said: "The business of a factor and a broker are in many respects unlike and in some similar. They are both agents of the owner to sell property. A broker is an agent employed to make bargains and contracts between other persons in matters of trade, for a compensation commonly called 'brokerage,' or, in the language of Lord Chief Justice Tindal: 'A broker is one who makes a bargain for another and receives a commission for so doing.' He is a mere negotiator between other parties, and never acts in his own name, but in the name of those who employ him. When he is employed to buy or sell goods he is not intrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name. He is a middleman, and for some purposes is treated as the agent of both parties. Where he is employed to buy and to sell goods, it is the custom to give to the buyer a note of the sale, called a 'sold ³⁷³ note,' and to the seller a like note, called a 'bought note,' in his own name, as agent of each, whereby they are respectively bound, if he has not exceeded his authority." There is no pretense here that the broker exceeded his authority. The "bought and sold notes" were executed in the regular course of business, and we see no reason why they were not competent evidence.

It appears, however, that there was in the city of Chicago an ordinance providing that it should not be lawful for any person to exercise within the city the business of broker without a license, and it is contended that, as Prentiss did not have a license from the city, his acts were void. As bearing on the question, counsel have cited cases holding that a broker could not recover commissions for his services as broker where he had not taken out a license. Whether a broker could, without a license, recover his commission is a question upon which the authorities are not harmonious. But conceding that counsel may be right on that question, it does not follow that a contract consummated by the broker would be void. Nor does the rule declaring that an action cannot be maintained which is predicated on a transaction prohibited by statute have any application to this case. The contract here involved was not unlawful nor was it prohibited. The mere fact that Prentiss was required to take out a license

from the city and had failed to do so could not prevent him from bringing the parties together, nor did it prevent them from coming together in the sale and purchase of the commodity in question. If Prentiss violated the ordinance in failing to take out a license, he might be liable to be prosecuted and fined, but that could not affect his acts so far as the rights of third parties were concerned. This court held in *Craig v. Dimock*, 47 Ill. 308, that while Congress had the power to require instruments valid under our state laws to be stamped, and had the consequent power to punish by fine any intentional evasion of the law, yet it had no power ³⁷⁴ to require such instruments to be stamped as a prerequisite to their validity or to their admissibility in evidence in the state courts. The principle involved in that case applies here. While the city might punish by fine for a failure to act without license, it was powerless to do anything which might invalidate a contract made by the broker.

It is claimed that the judgment should be reversed on account of improper remarks made by counsel for appellees in the closing argument to the jury. It is always the duty of the court to confine the remarks of counsel within due and proper bounds, but it is scarcely possible to lay down any general rule in regard to what an attorney shall or shall not say in an argument to the jury. Here, in the closing argument, it seems that a dispute arose between counsel in regard to whether certain evidence had been admitted for the consideration of the jury during the trial, and, as we understand the record, in this controversy the court ruled in favor of counsel for appellant. During this controversy much was said by counsel on both sides, but while objection may have been made to certain remarks, the court was not called upon to rule upon any particular language used. So far, therefore, as the ruling of the court is concerned on the question raised, we perceive no error, and if the court made no erroneous ruling on the question there can be no ground of reversal.

The court gave two instructions for the plaintiffs, the second of which is claimed to be erroneous. The instruction, as we understand it: 1. Informs the jury that if they find the issues for the plaintiffs, and that plaintiffs offered leaf-lard to defendant in accordance with the terms of the contract, and defendant refused to take and pay for the same, the measure of damages is the difference between the contract price and the market price of the goods in question at the time of the breach of the contract; 2. That plaintiffs were entitled to interest ³⁷⁵ at five per cent on money found to be due, if the jury found money was due from

defendant to plaintiffs. In regard to the measure of damages on a breach of contract, this court has held in a number of cases that the difference between the contract price and the market price is the true measure; and this seems to be the general rule, not only in this court, but in other courts and in the text-books. If the "bought and sold notes" constituted a written contract, as it was held in *Memory v. Niepert*, 131 Ill. 623, they did, under our statute interest was recoverable. Moreover, the recovery of interest in a case of this character is recognized and sustained in *Driggers v. Bell*, 94 Ill. 223, and *Plumb v. Campbell*, 129 Ill. 101.

The court, at the request of appellant, gave twelve instructions in his behalf. Several other instructions not numbered in the abstract were refused, and the ruling on the refused instructions is relied upon as error. After a careful inspection of the record, we are satisfied that by the instructions given the jury were fully informed in regard to all questions of law involved in the case, and no necessity existed for giving others.

The judgment of the appellate court will be affirmed.

UNLICENSED DEALINGS, VALIDITY OF CONTRACTS UNDER.—Business transactions in violation of law cannot be made the foundation of a valid contract: *Buckley v. Humason*, 50 Minn. 195; 36 Am. St. Rep. 637. No rights can spring from, or be rested upon, an act in the performance of which a criminal penalty is incurred, and all contracts which are made in violation of a penal statute are absolutely void, and cannot be recovered upon: *Youngblood v. Birmingham etc. Co.*, 95 Ala. 521; 36 Am. St. Rep. 245; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671, and monographic note thereto, discussing the subject. If a statute or ordinance makes a particular business unlawful generally, or for unlicensed persons, any contract made in such business by one not authorized is void: *Buckley v. Humason*, 50 Minn. 195; 36 Am. St. Rep. 637. An unlicensed broker, subject to a penalty for doing business without a license, cannot recover his commissions on contracts: *Johnson v. Hulings*, 103 Pa. St. 498; 49 Am. Rep. 131; *Holt v. Green*, 73 Pa. St. 198; 13 Am. Rep. 737; but it has been held that, while those making unlicensed contracts for the sale and purchase of bills of exchange are punishable, yet such contracts are legal, if not expressly prohibited: See extended note to *Woods v. Armstrong*, 25 Am. Rep. 676.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO BUY GOODS is the difference between the price contracted to have been paid, and the value of the goods when they ought to have been accepted: *Kadish v. Young*, 108 Ill. 170; 48 Am. Rep. 548; *Pittsburgh etc. Ry. Co. v. Heck*, 50 Ind. 303; 19 Am. Rep. 713; note to *Girard v. Taggart*, 9 Am. Dec. 336.

APPEAL—REVERSAL OF JUDGMENT.—IMPROPER REMARKS OF COUNSEL do not, of themselves, constitute any ground of review in an appellate court, though they were excepted to when made, unless the trial court was requested to take some action and erred in refusing or granting the request: *Lunsford v. Dietrich*, 93 Ala. 565; 30 Am. St. Rep. 79. As to when the misconduct of counsel

in argument is so seriously improper as to call for a reversal of judgment, see monographic note to *McDonald v. People*, 9 Am. St. Rep. 559-570, devoted to that subject.

JAMIESON v. WALLACE.

[167 ILLINOIS, 2-3.]

BROKERS—BUYING AND SELLING STOCKS—GAMBLING CONTRACT.—A contract with a broker, authorizing him to buy and sell stocks for the other party in the future, is a gambling contract, and not enforceable, where the parties have no intention of receiving or delivering the property, but do intend to settle accounts by the payment of differences between the contract price of the stocks and their market price when sold.

BROKERS—BUYING AND SELLING STOCKS.—TO INVALIDATE A CONTRACT for the purchase and sale of stocks in the future, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling only the differences.

BROKERS—BUYING AND SELLING STOCKS—SETTLEMENT BY PAYMENT OF DIFFERENCES—EVIDENCE OF INTENTION AS TO DELIVERY.—The intention of parties to a contract for the purchase and sale of stocks in the future is a question of fact to be established, not merely by their assertions, but from the circumstances of the transaction, such as the mode of dealing between the parties, the pecuniary ability of the party purchasing, and the fact that the party making the purchase, or broker, never calls upon the party ordering the purchase for the purchase money, but only for margins. Similar transactions between the parties, settled by the payment of differences, may also be considered.

BROKERS—BUYING AND SELLING STOCKS—PECUNIARY ABILITY OF PURCHASER—EVIDENCE OF INTENTION AS TO DELIVERY.—If a purchase of stocks, ordered through a broker, is must larger in amount than the purchaser is able to pay for, and this fact is known to the broker, it is a strong circumstance indicating no intention of receiving the property, but rather an intention to settle the difference between the market price and the contract price.

BROKERS—BUYING AND SELLING STOCKS—UNLAWFUL ACT—AGENCY.—There is no such thing as agency in the doing of an unlawful act. Hence, both parties to a gambling contract made with a broker to buy and sell stocks are principals.

BROKERS—BUYING AND SELLING STOCKS—SALE OF SECURITIES—RELIEF IN EQUITY.—If a person enters into a mere gambling contract with his broker for the purchase and sale of stocks in the future, and deposits securities with the broker to cover losses, the broker, in case of loss, is a "winner" of such securities, within the meaning of a criminal statute authorizing a proceeding in chancery to recover from the "winner" money or property lost to him by a gambling transaction. A bill in equity, therefore, lies to compel him to account for securities sold, to refund the amount thereof, and to return the unsold collaterals.

Bill in equity, filed by the appellee, Mary Wallace, against the appellants, Malcolm M. Jamieson, Roland C. Nickerson, Irving

H. Waggoner, and Henry F. Billings, doing business as stock brokers, in Chicago, under the firm name of Jamieson & Co. A portion of the securities delivered by the appellee to her brokers, as margins, had been sold by them, and it was decreed that they should account for such collaterals, that she was entitled to recover the amount thereof, and to have execution therefor, and that the defendants should return to her the unsold securities.

Egbert Jamieson and John A. Rose, for the appellants.

Pence & Carpenter, for the appellee.

³⁹⁵ MAGRUDER, C. J. According to the contention of the appellants in this case, they purchased for appellee, on December 5, 1892, one hundred shares of the Chicago Gas Company's stock at \$94 per share, making, with commissions, \$9,412.50, and, on January 17, 1893, purchased for her 100 shares of the Chicago, Milwaukee, and St. Paul Railway Company's stock at the cost, including commissions, of \$8,087.50, making the total amount of the purchases of the 200 shares of stock \$17,500. On July 27, 1893, appellants claim that, through a firm in New York City, they sold for appellee the 100 shares of railway stock for \$4,850, and the 100 shares of gas company's stock at \$4,800, making a total of \$9,650. The total amount of the loss, as represented by the difference between the purchases and the sales, is \$7,850. The latter amount is claimed by appellants to be due from appellee, and, to reimburse themselves, they claim the right to retain the securities delivered by her to them as margins.

The main question presented by the record is, whether or not the agreement between appellants and appellee with reference to the purchase of said 200 shares of stock was a gambling contract. The master, to whom the cause was referred by the circuit court, and the circuit ³⁹⁶ court and the appellate court have found the transaction to be a gambling transaction. It is well settled that, where a contract for the delivery and sale of stocks or other property in the future is not made with the intention that such stocks or property shall be received or delivered, but with the understanding, either express or implied, that the transaction shall be settled by the payment of the difference between the contract price and the market price at the time fixed, or at some future time, such a contract is a mere wager or gambling contract, and is void: *Schneider v. Turner*, 130 Ill. 28; *Pope v. Hanke*, 155 Ill. 617, and cases there cited. "All contracts made between parties, who have no intention of receiving and delivering the property, but intend merely to settle accounts by the payment of the differ-

ences, are void and will not be enforced": 8 Am. & Eng. Ency. of Law, 1005-1010. In order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only. But the intention of the parties in this regard may be established, not merely by their assertions, but by all the attending circumstances of the transaction. The question of intention is a question for the jury or for the court, to be determined by a consideration of all the evidence: *Pope v. Hanke*, 155 Ill. 617. The intention of the parties in such cases may be determined from the nature of the transaction, and from the manner and method of carrying on the business: *Irwin v. Williar*, 110 U. S. 507; *Gregory v. Wendel*, 39 Mich. 337; 33 Am. Rep. 390; 8 Am. & Eng. Ency. of Law, 1010; *North v. Phillips*, 89 Pa. St. 250; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Griswold v. Gregg*, 24 Ill. App. 384; *Carroll v. Holmes*, 24 Ill. App. 453; *Kennedy v. Stout*, 26 Ill. App. 133; *Miles v. Andrews*, 40 Ill. App. 155; *Pearce v. Foote*, 113 Ill. 228; 55 Am. Rep. 414; *Brand v. Henderson*, 107 Ill. 141; *Tenney v. Foote*, 95 Ill. 99; *Cothran v. Ellis*, 125 Ill. 496. An examination of the authorities above referred to will show that the intention of the ³⁹⁷ parties may be determined from a variety of circumstances. Among these circumstances, besides the mode of dealing between the parties, is the pecuniary ability of the party purchasing. If the purchases of a party, as ordered through a broker, are larger in amount than he is able to pay for, it is a strong circumstance indicating that there was no intention of receiving the property, but rather an intention to settle the difference between the market price and the contract price. Such intention may be also inferred where the party making the purchase never calls upon the party ordering the purchase for the purchase money, but only for margins. It makes no difference whether the real intention is formally expressed in words or not, if the facts and circumstances in proof show that it was the real understanding that there should be no actual purchase and no delivery or acceptance of the property involved in the contract, but merely an adjustment of damages upon differences.

After a careful examination of the evidence in this record, we are of the opinion that the finding of the lower courts was justified by the testimony. The appellee was a woman who had little or no experience in business. She had known the appellants for many years. One of the appellants had lived in her family, and both of them had been friends of herself and her family. She

was a woman of very limited means. When she first began to operate through the appellants, she had only about \$3,600 inherited from her husband. Shortly thereafter she inherited a further sum of about \$4,000 from her father's estate, but at no time did her total capital exceed about \$7,500. From her relations to the appellants and from all the circumstances disclosed by the proof, it is impossible to believe that they were not well acquainted with the limited extent of her means. A woman who was not in active business and had only \$7,500 in money could not have been expected to take and pay for stocks amounting in value to \$17,500. ³⁹⁸ Appellants never made any inquiry of her as to her financial ability. They never tendered to her at any time the stocks which they claim to have purchased for her, nor asked her for any money to pay the purchase price of such stocks. She swears that she did not understand that the stocks proposed to be purchased were to be paid for by her; that appellants said nothing to her about delivering the stocks to her, and never offered to deliver them to her, and never told her how long the stocks would be carried. Before the purchase of the two hundred shares of stock here in controversy, appellee had had four other transactions with appellants. In January, 1892, they had purchased for her one hundred shares of the West Chicago Street Railroad Company's stock of the value of \$13,243.75, and shortly thereafter had sold the same, receiving a profit of \$201.01, which they paid to her. In July, 1892, they had a second transaction with her in the same kind of stock, on which she received as profit from them about \$371.84. In August, 1892, she had a third like transaction with the appellants in the same kind of stock, on which she received as a profit from them \$571.12. In September, 1892, she had a fourth like transaction with them in the same kind of stock, on which she received as a profit from them \$39.74. In all of these transactions the shares were bought in each case at a higher price than \$13,000, and in the last transaction the shares were bought at \$205 a share, making with commissions \$20,535. In making purchases for amounts so far beyond the pecuniary means of appellee, it is impossible that appellants should not have known her inability to pay for the stocks so purchased for her, and therefore must have intended merely to settle the accounts by the payment of the differences, they to pay the profits, if there were any, to her, and she to pay the losses, if there were any, to them. She swears that she never intended to receive the stock so purchased by her, and that she was told by one of the defendants that he ³⁹⁹ could make some

money for her by speculating in such stocks, or by "scalping," as he expressed it. The appellants deny that they made use of any such word as "scalping," but they evidently did not expect that there would be an actual delivery of the stocks by them to appellee.

It is claimed by appellants that they made actual purchases of the stocks. They were represented in New York by brokers by the name of Fowler & Co. They telegraphed to New York to Fowler & Co. to purchase the stocks. The stocks were never delivered to appellants, who lived in Chicago. If the stocks were actually purchased, they remained in New York. Fowler & Co. did not make the purchases for the account of the appellee, nor did they know anything about appellee in the transaction. It is not entirely clear that there was an actual delivery of the stock to Fowler & Co. The witness, who testifies to buying it, says: "It was understood to be paid for in full on delivery." If the stock was in the possession of Fowler & Co., it would appear that it was pledged by them with some bank for the purpose of raising money, either to pay for such stock, or otherwise; at any rate, it is not clear that stock could have at any time been obtained from New York by appellants, if they had desired to tender it to appellee. But whatever may be the fact as to the nature of the transaction between the appellants and those representing them in New York, so far as the transactions now involved are concerned appellants and appellee were principals. The contract between the appellee and the appellants is the only contract which can be regarded in the decision of this case. It matters not whether Jamieson & Co. actually bought the stock in question or not. As was said in *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414: "There is and can be no such thing as agency in the perpetration of crime or misdemeanor, or, indeed, doing an unlawful act. All persons actively participating are principals." Therefore, ⁴⁰⁰ the suggestion that appellants merely acted as the agents for appellee in these unlawful transactions may be rejected at once as having nothing in its support: *Pearce v. Foote*, 113 Ill. 228; 55 Am. Rep. 414. The question here in issue is with reference to the dealing and understanding between the appellants and appellee, and not in regard to the knowledge and understanding of parties in New York. If the understanding between appellants and appellee was that the deal as between themselves should be settled upon differences, and that there should be no delivery of the stocks, then the contracts as between them were gambling contracts, and within the statute. "The doctrine of

agency has no application to the matter, so far as the question of the violation of this penal statute is concerned": *Carroll v. Holmes*, 24 Ill. App. 453.

The further question arises as to the jurisdiction of a court of chancery to entertain the present bill. Section 132 of the Criminal Code provides that: "Any person who shall, at any time, . . . by any wager or bet upon any . . . unknown or contingent event whatever, lose to any person so . . . betting, any sum of money or other valuable thing, amounting in the whole to the sum of \$10, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same shall be at liberty to sue for and recover the money, goods, or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit, or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction." In *Kennedy v. Stout*, 26 Ill. App. 133, in commenting upon said section 132, it was said: "If a person enter into a contract with his broker or commissionman, which is a mere gambling contract, and pass to him money or property to cover losses sustained thereby, then such broker or commissionman is a 'winner,' within the meaning of section 132 of the Criminal Code; and such person is ⁴⁰¹ given a remedy by such section of the statute against such broker or commissionman for the recovery of such money or property. What the nature of the contract is that the broker may have entered into with some third party on the board of trade or elsewhere is wholly immaterial or merely a circumstance of corroboration." The same doctrine was announced by this court in *Pearce v. Foote*, 113 Ill. 228; 55 Am. Rep. 414. See, also, *Carroll v. Holmes*, 24 Ill. App. 453, and *Griswold v. Gregg*, 24 Ill. App. 384.

In *Petillon v. Hittle*, 90 Ill. 420, 32 Am. Rep. 31, it was held that a bet on the result of an election, and the agreement growing out of the same for the stakeholder to pay the money deposited with him to the winner, were illegal and void, and that courts of chancery will assume jurisdiction to restrain the enforcement of unexecuted contracts founded on wagers or bets prohibited by law. In that case it was said that the section of the statute which provides that chancery may take jurisdiction when the loser sues to recover back money or property lost and paid to the winner, relates to money, property, etc., lost and paid on gaming, and not to prevent unexecuted contracts from being enforced. Here, as appellants must be regarded as the winners of appellee's

securities deposited with them, section 132 is applicable so far as it provides a remedy in chancery. The property here sought to be recovered has already been lost and paid on a gambling transaction: See, also, Chapin v. Dake, 57 Ill. 295; 11 Am. Rep. 15; Davidson v. Gibbons, 2 Bibb. 200; 4 Am. Dec. 695. We are of opinion that equity has jurisdiction to entertain the present bill.

The judgment of the appellate court and the decree of the circuit court are affirmed.

CONTRACTS TO DEAL IN FUTURES OR MARGINS ARE VOID as gambling contracts, unless there is a bona fide intention that the article contracted for shall be actually delivered and received in kind, at the time appointed in the contract: Note to Peet v. Hatcher, 57 Am. St. Rep. 58. Contracts for the future delivery of stocks or produce in which it is contemplated that the commodity shall not be delivered are contrary to public policy and will not be enforced: Lester v. Buel, 49 Ohio St. 240; 34 Am. St. Rep. 556, and note; Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23, and note. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver merchandise, and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices: Harvey v. Merrill, 150 Mass. 1; 15 Am. St. Rep. 159, and note; McGrew v. City Produce Exchange, 85 Tenn. 572; 4 Am. St. Rep. 771; Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; Floyd v. Patterson, 72 Tex. 202; 13 Am. St. Rep. 787.

STOCK GAMBLING—VALIDITY OF CONTRACTS—"WINNER" If the evidence shows that an agreement for the future delivery of commodities is a wagering contract, to be performed by the adjustment of the difference between the market and the contract price at the date fixed for its execution, the mere fact that one of the parties has professed to act in the character of a broker will not render him the less liable to the penalties of the law, nor constitute a defense to an action in which the other party seeks, under the provisions of a statute giving the loser of a wager the right to recover the money transferred to the winner, to recover the sum paid by him for the purpose of making that adjustment: Lester v. Buel, 49 Ohio St. 240; 34 Am. St. Rep. 556. A contract by which a stockbroker undertakes to buy and sell stocks for his customer charging him with commissions and interest on the money advanced, and holding the stock as security until it is sold, the customer to receive or pay the difference between the buying and selling value of the stock, is a contract for its sale on a margin, and void, and the customer may recover property conveyed to the broker as security for his advances: Cashman v. Root, 89 Cal. 373; 23 Am. St. Rep. 482. As to when a purchase of stock on margin is not a gambling transaction, see Peters v. Grim, 149 Pa. St. 163; 34 Am. St. Rep. 599. A broker, who buys and sells stocks in contravention of the statute is a "winner" within the meaning of a law which permits an action to recover back from the winner any money or property paid on account of a gambling transaction: See monographic note to Crawford v. Spencer, 1 Am. St. Rep. 765, on contracts for the sale of personal property to be delivered in the future. Compare monographic note to Horton v. Morgan, 75 Am. Dec. 313-326, on the duty of a stockbroker to his client.

SIEGEL v. SCHUECK.

[167 ILLINOIS, 522.]

ATTACHMENT.—GARNISHMENT is purely a statutory proceeding, and cannot be extended beyond the statute as construed by the supreme court of the state.

ATTACHMENT—GARNISHMENT—INDIVIDUAL ASSETS OF PARTNERS.—A judgment creditor of a firm cannot reach, by garnishment proceedings based on his judgment, a debt due to an individual member of the partnership.

CREDITOR'S BILL—INDIVIDUAL ASSETS OF PARTNERS.—The proper remedy of a judgment creditor of a partnership who desires to reach debts due to individual members of the firm is a creditor's bill.

A. Binswanger, for the appellant.

Cratty, Jarvis & Cleveland, for the appellees.

⁵²² **CRAIG, J.** This was an original garnishment proceeding instituted in the circuit court of Cook county by Edward A. Prior & Co. The affidavit of garnishment, upon which the proceeding was founded, alleged that Edward A. Prior & Co. obtained a judgment against Henry Schueck and William Recht in the circuit court of Cook county, at the September term, 1890, and that execution had been issued thereon and returned no property found, and that affiant had reason to believe that Siegel, Cooper & Co., and certain other parties, were indebted to said Henry Schueck and William Recht, or had effects or estate in their hands ⁵²³ belonging to them. Service of process was had on Siegel, Cooper & Co. and interrogatories were filed, wherein defendant, the garnishee, was required to answer whether, at the date of the service of the writ, it had in its possession, charge, or control any moneys, rights, credits, or effects, etc., owned by or due to the said Henry Schueck. The garnishee, Siegel, Cooper & Co., entered a motion to quash the interrogatories, but the court overruled the motion and required the garnishee to answer. Siegel, Cooper & Co. then put in an answer, in which it protested that it should not be required to answer the interrogatories, and stated that it was indebted to Henry Schueck in the sum of \$130.34, but had been garnisheed, since the commencement of this suit, in another suit instituted upon a judgment before that time obtained against Henry Schueck alone, and that it was not indebted in any manner to Henry Schueck and William Recht, and held no property of any description in which they have any interest or right.

Upon a trial of the cause before the court without a jury a judgment was rendered, wherein the court finds that Siegel, Cooper & Co. was indebted to Henry Schueck, at the date of the service of

be belongs to the debtor in whose name the suit is prosecuted."

Under the rule indicated, had there been a surplus, judgment could only be rendered for that surplus in the name of Schueck & Recht, when, at the same time, no part of the surplus belonged to them, but it all belonged to Schueck alone. The proceeding by garnishment is purely statutory, as held in *Illinois Cent. R. R. Co. v. Weaver*, 54 Ill. 319, and it cannot be extended to cases beyond the provisions of the statute as it has been construed by this court. If, therefore, Schueck & Recht could not maintain an action against Siegel, Cooper & Co. for the purpose of reaching a debt due from Siegel, Cooper & Co. to Henry Schueck, it is plain *Prior & Co.* cannot reach that indebtedness by the use of the name of Schueck & Recht as plaintiffs in this proceeding. In *Ford v. Detroit Dry Dock Co.*, 50 Mich. 358, where a similar question arose, the court held that the proceeding could not be maintained. In the decision of the case it is there said: "As we have found nothing in the statutes which allows garnishee proceedings to reach property or debts belonging to only a part of the principal defendants, and as it is manifestly required by the statute that the defendant or defendants in the principal suit shall be the person or persons in whose right the garnishee plaintiff is allowed to prosecute the garnishee defendants, there is, in our opinion, no foundation for this complaint. These proceedings are purely statutory, and cannot be extended ⁵²⁷ by construction." This case was approved in *Farwell v. Chambers*, 62 Mich. 316.

If the appellees desired to reach indebtedness due to the individual members of the firm of Schueck & Recht, resort might be had by creditor's bill in a court of equity; but we perceive no ground upon which their action in garnishment can be sustained.

The judgments of the circuit and appellate courts will be reversed and the cause remanded.

ATTACHMENT—GARNISHMENT—PROPERTY OF INDIVIDUAL MEMBER OF FIRM.—That a partner's property may be attached for a firm debt, see *Allen v. Wells*, 22 Pick. 450; 33 Am. Dec. 757. Compare monographic note to *Smith v. Smith*, 43 Am. St. Rep. 371, on the rights and remedies of partnership creditors. If a debt is due to a partnership, the interest of one of the partners therein cannot be reached by garnishment: See monographic note to *Russell v. Cole*, 57 Am. St. Rep. 442, as to the levy upon partnership assets of a writ against one partner only.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

LIGHT v. KILLINGER.

[16 INDIANA APPEALS, 102.]

NEGOTIABLE INSTRUMENTS—ALTERATION.—The insertion in a note, by the legal holder, of the name of a bank in a blank space after the words "negotiable and payable at," made merely by way of memorandum, in lead pencil, and in a different handwriting from that in the body of the note is not such an alteration as affects its validity in the hands of such holder, especially when there has been no attempt to treat the note as commercial paper or to transfer it, and the action is brought upon the note in its original form.

W. Bosson and J. W. Claypool, for the appellants.

Jaméson & Joss, for the appellee.

102 REINHARD, J. Killinger sued appellants, Light and Dixon, upon a promissory note, alleged to have been executed by Light to Dixon, and by Dixon indorsed to Killinger. Dixon and Light each filed a separate answer in two paragraphs, the first of which was the general denial, and the second set up a material alteration of the note. The appellee replied by general denial. The cause was submitted for trial **103** to the court. When the evidence was closed the appellants filed a demurrer thereto, which was overruled and an exception reserved to the ruling. The sole assignment of error presents the question of the correctness of the ruling of the court in overruling the demurrer to the evidence.

The evidence shows that Killinger was a manufacturer of refrigerators, and sold a quantity of such furniture to Dixon, who took in part payment the note executed by Light to Dixon, reading as follows:

"Indianapolis, Ind., July 31, 1891.

"Sixty ——— after date I promise to pay to W. H. Dixon one hundred dollars, negotiable and payable at ———, with interest at the rate of 6 per cent per annum from date and 5 per cent attorney's fees, value received, without any relief whatever from valuation or appraisement laws. The drawers and indorsers severally waive presentment for payment, protest or notice of protest, and nonpayment of this note. (Signed) R. G. LIGHT."

Dixon indorsed the note to Killinger by signing his name across the back. Two or three days before the note matured, Killinger indorsed the same to Balke & Krauss, a business firm in Indianapolis, with whom Killinger had dealings and to whom he was indebted on an account current. It was the practice of these parties that Killinger would turn over to Balke & Krauss notes received by him from his customers, and as payments on such notes were made, they were placed to Killinger's credit. If any note was not paid it was returned to Killinger.

When Killinger indorsed and delivered the note in suit to Balke & Krauss, Mr. Krauss, a member of said firm, asked Killinger in what bank Dixon transacted his business. Killinger answered that he did not know, but would ascertain the fact from Mr. Dixon. ¹⁰⁴ He saw Dixon and learned from him that it was the Bank of Commerce. He so reported to Mr. Krauss, and the latter thereupon, with a lead pencil, inserted the words "Bank of Commerce" in the blank space left in the body of the note following the words, "Negotiable and payable at." This was done in the presence of Killinger, but not by his direction.

When the note became due Balke & Krauss presented it for payment at the Bank of Commerce, but it was returned to them unpaid, and they returned it to Killinger, who, after repeatedly asking Dixon to pay it, and failing in the collection thereof, at the expiration of more than two years, brought this action upon it.

The suit is brought upon the note as it was before the insertion "Bank of Commerce" was made, said words not being contained in the copy declared upon.

It is the contention of the appellants' counsel that the facts above stated constitute a material alteration of the note made by and while in the hands of a legal holder or owner thereof, and that such alteration destroys the validity of the note and defeats the appellee's right to recover thereon, either in its original or altered form. We have carefully considered the question, and our conclusion is, that the court committed no error in overrul-

ing the demurrer to the evidence. There was evidence from which the court might legitimately have found, conceding that the insertion was made by the legal holder of the note, although it was shown that the firm of Balke & Krauss only held the paper for collection, that the words "Bank of Commerce" were inserted as a mere memorandum so as to enable the said Balke & Krauss to present it for payment when it became due, inasmuch as Dixon's residence was a considerable distance from their office. The words were written in pencil, and there appears ¹⁰⁵ to have been no attempt to indorse the note to any innocent purchaser, or to defraud or impose upon any one. It could easily have been seen at a glance that they were written by a different hand from those written in ink in the body of the note, and this was sufficient to put any purchaser upon inquiry. No harm has resulted to the maker or any other person from the placing of the words in the blank space. There was no attempt at any time to treat the note as commercial paper, and, as we have said, the action is upon the note in its original form. Even if the appellee had treated the note as one governed by the law merchant, we doubt our authority to hold that the alteration was unauthorized. The note bears upon its face every evidence of one negotiable under the statute as an inland bill of exchange. It contains the usual stipulation in such paper "that the drawers and indorsers severally waive presentment for payment, protest or notice of protest and nonpayment." It also contained the incomplete sentence "Negotiable and payable at," followed by a blank space. Under such circumstances, the place of payment may be filled by the holder: Randolph on Commercial Paper, sec. 186, and cases cited.

Of course, to make the paper negotiable by the law merchant, it must be made payable at a bank in this state: Burns' Rev. Stats. 1894, sec. 7520; Rev. Stats. 1881, sec. 5506. But when a bank is named in the note, without naming the state in which it is located, it will be presumed that such bank is within this state: Indianapolis etc. Co. v. Caven, 53 Ind. 258; Henderson v. Ackelmire, 59 Ind. 540; Clark v. Carey, 63 Ind. 105.

Hence, if the note had been made payable at the Bank of Commerce, it would have been a negotiable instrument under the statute. The words inserted were not repugnant to the plain purport and tenor of ¹⁰⁶ the contract, but in harmony with it. This being so, in the absence of any agreement or direction to the contrary, would the holder not be authorized impliedly to fill up the blank space, and if so, could the note not be collected, even in its changed form, especially by an innocent holder? Spitler v. James,

82 Ind. 202; 2 Am. Rep. 334; *Laellen v. Hare*, 32 Ind. 211; *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 318; *Blackwell v. Ketcham*, 53 Ind. 184; *Emmons v. Meeker*, 55 Ind. 321; *Marshall v. Drescher*, 68 Ind. 359; *Randolph on Commercial Paper*, sec. 123. As to this, however, we need not decide.

The rule is different, of course, where the note, perfect in its terms, is a non-negotiable one, but is changed so as to make it negotiable: *Cronkhite v. Nebeker*, 81 Ind. 319; 42 Am. Rep. 127; *De Pauw v. Bank of Salem*, 126 Ind. 553. In such a case, the holder would have no implied authority to change the purport of the note by filling the blank space with matter which is foreign to the apparent purpose for which the blank has been left: *McCoy v. Lockwood*, 71 Ind. 319.

There may also be instances when the maker would be liable to a bona fide holder without notice of the alteration, while not liable to the original payee or an indorsee who made the change: See *Cronkhite v. Nebeker*, 81 Ind. 319; 42 Am. Rep. 127.

But we have no such case here, nor do we hold that in the present case the maker is liable because he conferred an implied authority to fill up the blank space, for the appellee has not sought to hold him responsible on that ground. What we do decide is, that there was no material alteration, or at least that the trial court had the right so to conclude from the evidence.

That a material alteration of a note made by the holder will discharge the maker from liability on the ¹⁰⁷ instrument there can be no doubt under the authorities: 1 Am. & Eng. Ency. of Law, 508. But in the present case there was evidence from which the court could easily have drawn the inference that the pencil writing was made as a mere memorandum, without any intent to defraud and without any intent to change the character of the obligation.

In *Horst v. Wagner*, 43 Iowa, 373, 22 Am. Rep. 255, the payee, desiring to transfer the note, ignorantly erased his own name and wrote instead the name of the transferee. He afterward restored the note to its original form and indorsed it, and it was held in an action on the note that the alteration was immaterial.

An author of recognized standing says: "There may be many cases of innocent material alterations in which it would work injury, loss or inconvenience to confine the holder to a suit upon the original consideration. If the indorser were sued, and were held liable, he could not have the maker's note restored to him as a foundation for his action if it were utterly annihilated by the alteration. And the indorsee might have rendered such a consid-

eration as could not be recovered back; for instance, professional services, labor, or another note. For these reasons it would seem just to allow a more specific remedy; and while we have seen no precedent which so decides, it has been suggested that a court of equity would, under its jurisdiction over mistakes, correct an alteration innocently and mistakenly made, and restore the instrument to its original form. And there is no sufficient reason why the party should not himself be permitted to undo what he has mistakenly done, provided no other person has become so situated toward the instrument that it would operate prejudicially upon him. The burden of proving innocence would be a sufficient safeguard to prior parties; and when innocence ¹⁰⁸ is clearly proven, and the prima facie presumption of guilt overthrown, it would seem too rigorous to inflict upon the innocent a penalty only deserved by the guilty": 2 Daniel on Negotiable Instruments, sec. 1414.

In a Pennsylvania case, where, within an hour after the note was signed, the payee returned to the maker's office, where the clerk, at the payee's request, but without the knowledge or consent of the indorser, inserted the words "with interest," the maker ratifying the action of the clerk, but subsequently the payee had the inserted words expunged, apparently with chemicals, and sued the maker upon the note in its original form, the latter resisted payment on the ground that the note had been altered, but it was held that, no fraud having been intended, the plaintiff had a right to restore it to, and sue upon it, in its original form, Thompson, C. J., saying: "Now, it seems to me that, as the identity of the note remained and there was nothing in it to enlarge the obligation of the indorser, and as what had been done was innocently, but mistakenly, done and expunged, for aught we know, within the hour after it had been done, there is no rule of law unreasonable enough to hold it avoided by this. I admit that if there had been evidence of a fraudulent tampering with the note, a different rule would apply. But regarding it as mistakenly done, in an attempt to make the note comply with the contract, and assented to by the original parties, one of them the principal in it, and without fraud, ought the consequences of such an act, done under such circumstances, be made to rank with fraud and perjury? It ought to be regarded as it manifestly was, to the indorser, immaterial": Kountz v. Kennedy, 63 Pa. St. 187; 3 Am. Rep. 541.

In Shepard v. Whetston, 51 Iowa, 457, 33 Am. Rep. 143, a blank in the note, after the word "at" was filled ¹⁰⁹ without any

fraudulent design, with the words "with ten per cent interest from date." The note was subsequently restored to its original form and negotiated to an innocent holder without notice. It was held that he could recover on the note.

In *American Nat. Bank v. Bangs*, 42 Mo. 454, 97 Am. Dec. 349, there had been added at the foot of the note, to the left of the signature, the words, "at Goodyear Bros. & Durand's, New York, Jan. 10-13," after the words "due at." It was urged that this was such a material alteration as would avoid the note. The court held that the words were to be taken as a mere memorandum, and, therefore, immaterial, the court saying: "It should be kept in mind that this action is against the makers themselves. It is not declared upon as a note payable at the city of New York. . . . The memorandum in this case does not increase or vary in any respect the liability of the defendants, and therefore presents no obstacle to the recovery of the plaintiff."

As said by Lotz, J., in *Kingan v. Silvers*, 13 Ind. App. 80: "No direct injury was done the defendants by the alteration of the note. The utmost that can be said is, that a rule of public policy was violated. The doctrine of public policy, like the statute of frauds, should be invoked to prevent and not to perpetrate a fraud. A clear and unmistakable case of the violation of a rule of public policy should be made before the law will lend its aid to depriving one person of his property for the benefit of another": See, also, *Palmer v. Sargent*, 5 Neb. 223; 25 Am. Rep. 479; *Derby v. Thrall*, 44 Vt. 413; 8 Am. Rep. 389.

The court did not err in overruling the demurrer to the evidence.

The judgment is affirmed.

ALTERATION OF INSTRUMENTS—WHEN WILL NOT AVOID. Alteration of an instrument may be considered immaterial, if neither the rights, interests, duties, or obligations of either of the parties are in any manner changed: *Vogle v. Ripper*, 34 Ill. 100; 85 Am. Dec. 298, and note. The intention with which the alteration is made is a material fact: *Hunt v. Gray*, 35 N. J. 227; 10 Am. Rep. 232; *Croswell v. Labree*, 81 Me. 44; 10 Am. St. Rep. 238. See notes to *Lee v. Butler*, 57 Am. St. Rep. 472; *Newman v. King*, 56 Am. St. Rep. 711.

ROBERTSON v. HAMILTON

[16 INDIANA APPEALS, 328.]

EVIDENCE—RES GESTAE.—In an action for slander in charging a married woman with adultery with a certain person, after a witness has testified that some time before the time of the alleged slander he met the plaintiff and her husband, that plaintiff was crying, and upon being asked by the witness what was the matter, she replied that her husband could tell him, further testimony by such witness that he and plaintiff's husband soon thereafter started away, and that, in the absence of the plaintiff, her husband then stated to the witness that his wife had confessed to having been guilty of adultery with such named person, is not admissible as part of the *res gestae*.

EVIDENCE—BAD CHARACTER—SPECIFIC ACTS.—The bad character of a woman cannot be proved by evidence of specific acts of lewd or immoral conduct on her part with one man five or six years prior to her alleged adultery with another man.

J. E. Lamb and J. T. Beasley, for the appellant.

G. W. Faris and S. R. Hamill, for the appellee.

328 DAVIS, C. J. This was an action for slander. The gist of the complaint is, that appellant falsely charged that appellee, a married woman, had illicit carnal intercourse with one Ed. Cummings.

The appellant answered in two paragraphs: 1. Justification, that appellee had "illicit carnal intercourse with one Ed. Cummings"; 2. General denial. A trial by jury resulted in a verdict and judgment for seven hundred and fifty dollars in favor of appellee.

We have read the voluminous record, including all the evidence given on the trial, in the light of the argument of learned counsel, and find two questions properly and ably presented for our consideration on this appeal.

1. The fifth and twelfth reasons for a new trial relate to the action of the court in refusing to permit the appellant to prove, by Sol. Craig, a conversation had by the witness with the husband of the appellee, in her absence, in which the appellee's husband told the witness that appellee had confessed to her husband that she had been guilty of having illicit carnal intercourse with Ed. Cummings.

It is not claimed that the statements or admissions of the husband to said Craig were at any time communicated to appellant, or that his charge against appellee was based on her alleged confession to her husband.

The witness Craig testified that in the month of April, 1893, he met the appellee and her husband in the public highway in the

vicinity of their residence; that her husband had been very sick with a severe attack ³³⁰ of the grippe for several weeks prior thereto, and that he was then convalescing, but was not well, and that the witness then believed that he was slightly off mentally, and that the witness could not say that he did not know what he was saying; and that the appellee was crying.

The witness said to her: "What is the trouble, Ollie?" She replied: "Charley can tell you." In the same connection she said: "I don't know what is the matter, he acts so strange, and he is wanting to go to Mattoon, and I don't want him to go, and he says he is going to leave," and that he had tried to kill himself that morning. This conversation was in the afternoon or evening. In the course of the conversation her husband said to her, "Ollie, I want you to tell Sol. now whether I am to blame for any of this trouble or not." Appellee answered that he was not. She asked the witness to take her husband home with him and keep him all night.

Appellee's husband got in the wagon with the witness and they drove away. Appellant's counsel then asked the witness this question: "After he got in the wagon with you, tell the jury whether he made any statement as to the trouble and what it was about, whether he did or not?"

An objection of counsel for appellee was sustained to the question.

Counsel for appellant then offered to prove by the witness that as soon as appellee's husband got in the wagon with the witness he stated to the witness that his wife had confessed to him that she had betrayed him, that she had been too intimate with Ed. Cummings, and pointed out to the witness the place in the road where she had made the confession. The court excluded the evidence, and to which ruling appellant at the time excepted.

³³¹ Counsel for appellant insist that the statements of appellee's husband were a part of the conversation begun with the appellee, and that they were admissible as part of the *res gestae*.

When the alleged confession was made by appellee, whether on that day or on some previous day is not disclosed. The statements of the husband to the witness in relation to the alleged confession of his wife were, in our opinion, no more than a mere narrative of a past occurrence, and therefore were not admissible on the trial in behalf of appellant as a part of the *res gestae*: *Parker v. State*, 136 Ind. 284; *Citizens' Street R. R. Co. v. Stoddard*, 10 Ind. App. 278; *Cleveland etc. Ry. Co. v. Sloan*, 11 Ind. App. 401.

It is next insisted that she directed her husband to continue the conversation with the witness, and therefore that his statements to the witness were admissible in evidence against her.

The general rule is, that the admissions of a third person are admissible in evidence against a party who has expressly referred another to him for information, regarding a disputed or uncertain matter. In such cases, there must be a disputed or uncertain matter which is the subject of inquiry, and there must be a clear and direct reference to the third person for the desired information. In order to bind the party by the admission of a third person, the reference must have been made by the person sought to be bound with the definitely stated intent by the person making the reference, that the person making the inquiry should secure of the third person the desired information regarding a disputed or uncertain matter.

There is nothing in the conversation between appellee, her husband, and the witness indicating that there was any matter in dispute between any of the parties.

The only indication of any trouble appears to have ³²² been the fact that the appellee was crying. The inquiry of the witness was prompted by reason of the uncertainty as to the cause of the trouble. So far as shown, the witness had no interest in this uncertainty, and his inquiry appears to have been prompted solely by curiosity. The conversation in her presence, when considered as an entirety, strongly indicates that her crying was the result of the strange conduct of her husband, to which she referred, and that she was ignorant as to the cause of such conduct. She said, in response to her husband's question, that he was not to blame for the trouble. She did not, however, intimate to the witness that she was in any manner responsible for the trouble. In response to the question of the witness she said, "I don't know what is the matter, he acts so strange," etc. Her reference of the witness to her husband for information was not in direct terms with a definitely stated intent, but was permissive only in character. The substance of her statement to the witness was that she did not know what was the matter, but that her husband might explain the matter to the witness if he could. She did not intimate that she had made a confession to her husband which he was at liberty to communicate to the witness, and she did not refer the witness to her husband for information on such subject.

Whether such a confession made by a wife in confidence to her husband can in any case be proven in this manner is a doubtful

question. In any event, in our opinion, the rule relied upon by counsel for appellant is not applicable under the facts and circumstances as disclosed by the record.

2. The sixth, seventh, and eighth reasons for a new trial all relate to the refusal of the court to allow the appellant to prove that in 1887 the appellee said that she dearly loved one Black, and that she thought more ⁸⁸³ of him than she did of her husband, and that on one occasion she threw her arms around his neck and kissed him. The witness was then a domestic in the service of appellee and her husband, and said Alf. Black was then living in the family and working for her husband.

This was five or six years prior to appellee's alleged acquaintance and illicit intercourse with said Ed. Cummings.

Counsel for appellant insist that the evidence was admissible as tending to establish her character for chastity and the probability that the appellee would have been guilty of the acts charged with Cummings. In other words, the contention is that in such cases the character of the woman for chastity may be attacked by proof of specific acts of lascivious or immoral conduct. Assuming that there may be cases in which specific acts of lascivious or immoral conduct may be proven, there was no error in the ruling under consideration.

In deciding a similar question in Indianapolis etc. Co. v. Pugh, 6 Ind. App. 510, this court, by Reinhard, C. J., said: "We do not think there was any error in this ruling. True, the appellee's character was put in issue. But this can be proved only by general reputation, and not by specific acts of immorality, wholly disconnected from the acts charged in the publication."

The fact that appellee may have had an undue affection for Alf. Black in 1887, or that she was then guilty of unbecoming conduct with him in the presence of others, did not tend to prove that she had illicit carnal intercourse with Cummings in 1892 or 1893.

The act with Black, which appellant offered to prove, was wholly disconnected from the conduct with Cummings.

⁸⁸⁴ On a careful reading of the evidence, we are not favorably impressed with the merits of this action, but we fail to find any error in the record that would justify a reversal of the judgment of the trial court.

Judgment affirmed.

EVIDENCE—RES GESTÆ.—All declarations or exclamations uttered by the parties to a transaction which are contemporaneous with and accompany it, or which are made under such circumstances as will raise a reasonable presumption that they are the spontaneous

utterance of thoughts created by, or springing out of, the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design, and which are calculated to throw light on the motives and intention of the parties, are admissible in evidence as part of the *res gestae*: Note to *Wilson v. Southern Pac. Co.*, 57 Am. St. Rep. 771.

EVIDENCE—AS TO CHARACTER.—When character is in issue, it may be shown only by evidence of general reputation, and not by proof of specific acts: *Miller v. Curtis*, 158 Mass. 127; 35 Am. St. Rep. 409, and note. The proof should be confined to a time not very remote from the date of the offense alleged: *State v. Barr*, 11 Wash. 481; 48 Am. St. Rep. 891. See, also, *Rice v. State*, 35 Fla. 236; 48 Am. St. Rep. 245, and note.

METZGER v. SCHULTZ.

[16 INDIANA APPEALS, 454.]

LANDLORD AND TENANT—LIABILITY FOR DEFECTIVE PREMISES.—A landlord is not liable for an injury to an employé of his tenant resulting from defective plumbing on the leased premises performed by a competent and skillful mechanic voluntarily employed by a prior tenant, provided the defects were not apparent, not within the knowledge of the landlord, and of such nature that he could not have known of them in the exercise of reasonable diligence.

EVIDENCE — PRESUMPTIONS.—If undisputed testimony shows that a gaspipe was properly supported when placed in a building, it is presumed that such support continued until a cause arose to destroy it, and evidence that after an explosion of such gaspipe no support was found does not overcome such presumption.

L. B. Swift, for the appellant.

V. Carter and W. T. Brown, for the appellee.

⁴⁵⁵ LOTZ, J. This action was instituted by the appellee against the appellant and one Henry C. Pomeroy. The defendants filed separate demurrers to the amended complaint and Pomeroy's demurrer was sustained, and a judgment was rendered in his favor for costs. The appellant answered by general denial, and the trial resulted in a verdict of \$1,000 for the appellee, for which judgment was rendered in his favor, after appellant's motion for judgment upon answers to interrogatories and her motion for a new trial had been overruled. The appellant appeals to this court, and asks a reversal upon several errors assigned.

The amended complaint alleges that October 1, 1887, Alexander Metzger, the husband of the appellant, owned certain real estate in Indianapolis, upon the southwest corner of Pennsylvania and North streets, upon which was a two-story brick building with a cellar, leased and occupied by the defendant, Pomeroy, for a drugstore. That immediately west of and adjoining said drugstore was another brick building with a cellar. That the two cellars were separated by a brick wall, with no communication be-

tween them. That on said day Pomeroy did some gasfitting in the drugstore cellar, and did it negligently. That the pipes were old, rusty, defective, and improperly constructed. That no elbows were used, but that when ⁴⁵⁶ a turn was to be made the pipes were bent, causing a constant, severe, and unusual strain, and the pipes were loosely fastened to joists.

That Alexander Metzger died August 4, 1892, devising said real estate to his wife, the appellant. That afterward Pomeroy surrendered the drugstore premises, including said pipes to the appellant. That the appellant, with full knowledge of the defective condition of the pipes, maintained the same in such condition, and on September 1, 1892, leased said drugstore premises, including said fixtures, to Thomas C. Potter, and until September 21, 1893, with full knowledge of said defective condition, received rent for said premises.

That on September 21, 1893, said second building immediately west of said drugstore was leased to Jones and Berry as tenants of the appellant, for a grocery, and the appellee was employed by said firm.

That by reason of said defective gasfitting, the pipes in the drugstore cellar cracked and broke so that the gas escaped and diffused itself through said cellars and buildings, and especially in said drugstore cellar.

That on said day, September 21, 1893, said gas, escaping as aforesaid, exploded in said drugstore cellar while the appellee was engaged in his usual duties in said grocery and cellar adjoining said drugstore, and hurled the appellee down, and caused large quantities of brick and mortar from said cellar wall to fall upon him, injuring him externally and internally, and burning him.

The undisputed evidence in this case shows that in 1887 one Alexander Metzger was the owner of the real estate described in the complaint. The ground floor of the building was divided into two rooms and the cellar into three rooms. Alexander Metzger demised the east room and cellar to one Henry C. Pomeroy for a ⁴⁵⁷ drugstore. While Pomeroy was in possession he voluntarily and of his own accord caused a gaspipe to be connected on the north side of the cellar with the Consumers' Gas Trust Company's main, for the purpose of lighting the drugstore by natural gas. He employed a plumber and gasfitter for this purpose. A brass stopcock was put in the pipe near the wall where the connection was made. This pipe was necessarily many feet in length in order to reach from the connection to the point where it rose to conduct the gas into the drugstore, and it was deflected or sprung

from a straight line. Alexander Metzger died August 4, 1892, and devised the real estate to his wife, the appellant. Afterward Pomeroy sold his drug business to one Thomas C. Potter, and gave him the immediate possession of that part of the premises leased by him. Potter continued in possession and paid rent to appellant's agents for several months. On the eighteenth day of August, 1892, the appellant demised the drugstore premises to Potter for the period of three years. On September 21, 1893, the west end of the building, including the cellar thereunder, was leased to Jones and Berry for the purposes of a grocery store, and they were engaged in conducting that business therein. The appellee was in their employ as a clerk, and descended into the cellar under the grocery store, when an explosion occurred and he was badly burned. There were two explosions in rapid succession. One of the explosions partly demolished one of the partition walls of the cellar and large quantities of brick and mortar were hurled in the direction of the gaspipe. After the explosion, the gaspipe was found broken off at the brass stopcock. The appellant at no time before the explosion had any actual knowledge of the condition of the gaspipe.

Appellant's contention is, that as she came into the ⁴⁵⁸ possession of the property, with all the existing conditions; and that as she had no actual knowledge of any defect in the pipe, she is not chargeable with negligence in keeping the premises in a reasonably safe condition, and, therefore, not responsible for the injuries to the appellee.

This presents one of the principal questions involved in this controversy.

The general rule is, that every person must so use his own property as not to injure others. Anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights is an actionable nuisance: Cooley on Torts, sec. 565. A nuisance may result from the negligent acts of commission or omission. It is also the general rule that the occupier of lands is *prima facie* responsible for any nuisance maintained thereon and not the owner. But to this rule there are several well-defined exceptions. The owner is responsible if he creates a nuisance and maintains it. He is responsible if he creates a nuisance and then demises the premises with the nuisance thereon, although he is out of possession. He is liable if a nuisance was erected on the land by a prior owner or by a stranger, and he knowingly maintains or continues it. He is liable if he demised the premises and covenanted to keep them in repair, and omits to repair, thereby

creating a nuisance. He is liable if he demise the premises to be used as a nuisance, or to be used in any way so that a nuisance will necessarily be created. But a grantee or devisee of lands upon which there is a nuisance at the time the title passes is not responsible for the nuisance until he has notice of its existence, and, in a certain class of cases, until he has been requested to abate the same. Penruddock's case, 3 Coke, pt. 5, p. 101, is one of the earliest cases bearing on these questions. ⁴⁵⁹ It was there decided that an action will lie against one who erects a nuisance without any request to abate it; but not against the feoffee, unless he does not remove the nuisance after request. This case has been generally followed by the English and American courts. The first rule announced in that case is a reasonable one. If the owner create a nuisance, knowledge of its existence is necessarily involved in the act. If he suffer or permit the premises to become out of repair while he is the occupant, so that a nuisance results, the law implies notice. The second rule has been generally applied to the obstructions of private ways, ancient lights, the diversion of waters and watercourses by dams, embankments, etc. This rule, when applied to such cases, is also a very reasonable one, because otherwise the grantee or devisee of the property on which the nuisance exists might be subjected to great loss on account of conditions of which he was ignorant, and damages which he never intended to occasion. Often such conditions cannot be easily known except to the party injured, and, so long as he rests in silence and does not make any complaint, the new owner or occupant has the right to presume that the structures and appliances thereon were rightfully erected, and he is not bound to know or suspect that before he became the owner, one party committed a wrong and the other submitted to it. The case of *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, whilst differing widely in its facts from the case at bar, is a very instructive case, and the authorities bearing upon the above propositions are reviewed at great length in the able prevailing and dissenting opinions.

In the case at bar, neither the appellant nor her devisor covenanted with the tenants to erect new structures or make repairs. In the absence of such ⁴⁶⁰ covenants, it was the duty of the tenant to keep the premises in proper repair, and if he erected new structures or put in new appliances for his own accommodation, he alone is liable for the consequences. If the tenant, Pomeroy, had remained in possession up to the time of the explosion, it is apparent that appellant would not have been liable. When the

landlord has not covenanted to make repairs, he has no right to enter upon the premises. The exclusive right is in the tenant. Does the fact that Pomeroy sold his business to Potter, who went into immediate possession and became the tenant of appellant, change her responsibility? If Potter's tenancy was but a continuation of Pomeroy's, then the appellant is not liable; but it was not a continuation. A new tenancy was created. She demised the premises to Potter in their existing condition with the defective pipe. Under the rule above announced, she was responsible for the nuisance existing thereon, if she knew that there was a nuisance. Appellant's counsel insists that as but an instant elapsed between the tenancy of Pomeroy and that of Potter, that she could not have had notice of the nuisance.

It is true that she had no actual notice, but she had it in her power to have ascertained the existing conditions before accepting Potter as a tenant. If she had the power, and failed to exercise it, she will be bound as if she had notice. If a landlord demise his property, the law requires him to know its condition at the time he accepts a tenant. The rights of others are frequently involved by the condition in which the premises are maintained. Any person who conducts upon his premises any dangerous business, or has thereon any dangerous machinery or substance, not in themselves unlawful, is in duty bound to exercise reasonable care and vigilance to see that no harm ⁴⁰¹ comes to others in consequence thereof. But the landlord is not an insurer. There are many businesses, machinery, and appliances not nuisances, per se, that are attended with danger. When the landlord has exercised reasonable care in respect thereto, he is exonerated from liability. If, in the erection of structures and appliances, and in conducting business on his premises, he has employed and relied upon persons who are careful, prudent, and skillful, and has exercised care to keep his premises in a safe condition, he has done all that the law requires. The appellant further insists that as a competent and skillful person was employed to do the gasfitting, she is not responsible for the injury to appellee.

There was some evidence in this case that tended to show that the gasfitting was improperly and unskillfully done; that there was a strain upon the pipe which might have caused it to break, especially at the brass stopcock. But there was no evidence that the gasfitter who did the work was unskillful or incompetent, except as that fact might be inferred from this particular work. On the other hand, the undisputed evidence shows that the gasfitter who made the connection was a plumber, steam and gasfitter of

many years' experience. A skillful person may occasionally perform a piece of work in an unskillful manner. The inference that one is an unskillful person cannot be established from a particular isolated piece of work, especially when the undisputed evidence shows that he is a workman of many years' experience. If the workman were sued for his own unskillfulness, he would be compelled to answer; but when a master or landlord is sued for a liability growing out of failure to employ a competent and skillful person, it is not enough to show that the workman did a particular piece of work in an unskillful manner. Before the ⁴⁶² jury was warranted in concluding that the gasfitter who did the work was unskillful and incompetent there must be some evidence fairly tending to establish it. The rule is that when there is any evidence, having legal weight, bearing upon a given issue or fact, the party producing it is entitled to go to the jury thereon. If the evidence adduced is so slight and inconclusive that no rational or well-constructed mind can infer from it the fact it is offered to establish, the court may direct the verdict: *Sunnyside Coal etc. Co. v. Reitz*, 14 Ind. App. 478; *Connor v. Giles*, 76 Me. 132; *Thompson on Trials*, secs. 2246, 2249.

If Pomeroy had remained in possession until the explosion, he would not have been liable under these circumstances. He was not required to set his judgment against that of a person of technical skill. If Pomeroy, the person who had the work done, was not liable, then the appellant is not liable.

It may be conceded that the appellant, when she made the demise to Potter, was bound to take notice of the dangerous and explosive character of gas, artificial and natural, and to take notice of such defects as were apparent and might have been easily ascertained by a person of ordinary prudence. But there was no evidence in this case that the defect in the pipe was of such a character that a person of ordinary prudence could have ascertained it. The pipe had been in use for more than four years and had performed good service during all that time. She was not required to override the judgment of experienced plumbers and gasfitters and persons of technical skill. She was entitled to rely upon their skill and judgment. In our opinion the appellant was guilty of no actionable wrong.

The case of *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189, is urged upon our attention as holding a contrary doctrine. In ⁴⁶³ that case the nuisance existed at the time of the demise and the landlord had actual knowledge of its existence. In the case at bar, the appellant was chargeable with notice of the existing condi-

tions, but she was not required to know that those conditions created a nuisance. In the case last cited, the landlord not only knew of the existing conditions, but he knew that they were equivalent to a nuisance. It would be a harsh rule, indeed, that would require the landlord to answer for every defect in his property. If he employs competent and skillful persons in the construction and repair of his premises, and relies upon their judgment, he has done all that should be required of a reasonable and prudent person.

In this case, Pomeroy, the first tenant, had the right to assume that the work was done in a skillful and safe manner. The law would have protected him. Appellant is in no worse condition.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

ON PETITION FOR REHEARING.

LOTZ, C. J. The appellee, in his argument in support of his petition for a rehearing, earnestly insists that we overlooked and failed to consider the point upon which he placed his chief reliance for an affirmance of the judgment, that of negligence in the manner of constructing, and failing to properly support, the gas-pipe. Upon this question it is contended that the evidence is conflicting, and that it was therefore a question for the jury, and not one upon which this court can arbitrarily say, as a matter of law, there was no negligence.

The undisputed evidence shows that a competent and skillful gasfitter was employed to do the work, and his uncontradicted testimony was that he supported ⁴⁶⁴ the pipe by chain or wires, suspended from the joist of the building. It was true there was some evidence to the effect that after the explosion no evidence of such support was found. But this evidence was very meager, and related to a time after a large quantity of brick and debris had been hurled with great violence against the pipe and joist. But if it be conceded that no supports were found after the explosion, this does not tend to prove the fact that the pipe was unsupported on the day the appellant leased the premises to Potter. The undisputed testimony showed that the pipe was supported when first erected. The presumption is, that it so continued until a cause arose sufficient to destroy such supports. The general rule is, that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is so established by evidence, either direct or presumptive: *Smith v. New York etc. R. R. Co.*, 43 Barb. 225; *Lawson on Presumptive Evidence*, 165, 176.

The burden rested upon the appellee to show that the pipe was unsafe and improperly supported on the day when Potter became the lessee. There was an entire absence of evidence on this point.

Petition overruled.

LANDLORD AND TENANT—DEFECTS IN LEASED PREMISES.—A tenant assumes the risks of the condition of premises if he inspects them before accepting a lease, and the landlord is not guilty of any concealment: *Blake v. Dick*, 15 Mont. 236; 48 Am. St. Rep. 671, and note. The maxim of caveat emptor applies between lessor and lessee: *Clifton v. Montague*, 40 W. Va. 207; 52 Am. St. Rep. 872, and note. A landlord is not answerable to the tenant for injuries resulting from water-pipes or from the mode of constructing the building or appurtenances, there being no latent defect, fraud, or concealment: *Buckley v. Cunningham*, 103 Ala. 449; 49 Am. St. Rep. 42, and note.

EVIDENCE—PRESUMPTIONS.—The presumption is, that when a certain state of facts is proven to exist, they continue until that presumption is rebutted by proof or some counter-presumption arising from lapse of time or other circumstance: *Table Mountain etc. Min. Co. v. Waller's etc. Min. Co.*, 4 Nev. 218; 97 Am. Dec. 528. See, also, extended note to *Berrenberg v. Boston*, 50 Am. Rep. 297-303.

SALEM v. McCLINTOCK.

[16 INDIANA APPEALS, 656.]

SURETYSHIP—NONOFFICIAL BONDS.—If duties are imposed upon a principal in a nonofficial bond, which are not commonly attached to the position which he is filling, and no mention of such unusual and different duties is made in the conditions of such bond, the sureties thereon can only be held for the default of the principal in the performance of such duties as are plainly and commonly understood to belong to the class of employment by which the principal is designated.

SURETYSHIP.—SURETIES ARE NOT BOUND beyond the strict terms of their engagement, and their liability cannot be extended by implication.

SURETYSHIP—LIABILITY ON BOND OF CITY SUPERINTENDENT OF WATER WORKS.—Ordinarily the duties of a superintendent of city water works do not include the collection of moneys, nor do they constitute him the financial agent for the settlement of accounts and the handling of the revenues of the city; and the sureties on his bond are not liable for his default in failing to account for water rents collected by him in the absence of any condition in the bond, or ordinance authorizing him to collect such rents.

S. H. Mitchell and R. B. Mitchell, for the appellant.

D. M. Alsbaugh, J. C. Lawler, and H. Morris, for the appellee.

657 HENLEY, J. Appellant filed its complaint in the lower court in four paragraphs, against Charles McClintock, Edward W.

Barrett, and Fred L. Prow, seeking to charge them as sureties upon four separate bonds executed by one Elkana Craycraft, as principal, and McClintock, Barrett, and Prow, as sureties. Appellees demurred jointly and separately to each paragraph of the complaint, all of which demurrers were by the court below sustained, and the appellant refusing to plead further, the court rendered judgment upon demurrer.

The only error assigned in this court is the ruling upon the demurrers.

Each paragraph of the complaint declares upon a separate bond; appellees McClintock and Prow being sureties on the bonds executed in 1891, 1892, and 1894, and McClintock and Barrett upon the bonds executed ⁶⁵⁸ in 1893. Elkana Craycraft, the principal in all the bonds declared upon, is now dead, and died prior to the commencement of this action.

The appellant is an incorporated town, and is the owner of a system of water works for supplying its inhabitants with water and for protection against fire, and by written contract employed Elkana Craycraft to superintend such water plant.

The contract entered into between appellant and Craycraft is as follows:

"This contract made and entered into by and between the town of Salem, in Washington county, Indiana, and Elkana Craycraft, of Salem, Indiana, witnesseth, that the said town of Salem, by its proper officers, has this day employed the said Craycraft to serve as superintendent of the waterworks of said town for the period of one year from the third day of October, 1893, and in consideration of the faithful performance of the service hereinafter specified by said superintendent, said town agrees to pay said Craycraft the sum of \$374.50 per year, the same to be allowed and paid in monthly installments. The duties required of said superintendent under this contract of employment are as follows, viz: He shall attend to and do all the pumping required. He shall collect water rents, and shall keep a waterworks ledger, and open and keep an accurate account with each water consumer. He shall make and keep up all necessary repairs for said waterworks system. He shall attend to the slushing out of the hydrants and pipes of said system, and especially the dead ends thereof, as often as is necessary to keep the water pure and wholesome. All material to be used for repairs is to be furnished by said town without any intervening agency, and no bills for repairs will be allowed by the board of trustees of said town without being first ⁶⁵⁹ authorized by said board, and finally such superintendent is to dis

charge all duties usually devolving upon such an official and not specifically herein enumerated.

“Witness the seal of said contractor, and the name of the president of said board of trustees, attested by the clerk of said town this third day of October, 1893.

“ELKANA CRAYCRAFT, [Seal]

“CHAS. A. ALLEN, Pres.

“Attest: JOHN W. SPAULDING,

“Town Clerk.”

And to secure the faithful performance of his duties as superintendent of the waterworks of the town of Salem the said Craycraft and his sureties at different times executed four several bonds covering all the time said Craycraft was such superintendent, which bonds are all alike, and are in words and in figures as follows:

“State of Indiana, Washington county: Know all men by these presents that we, Elkana Craycraft, Charles McClintock, and Fred L. Prow are held and firmly bound unto the trustees of the town of Salem, in the state of Indiana, in the sum of one thousand dollars (\$1,000.00) for the payment of which we bind ourselves, our heirs, and personal representatives. The consideration of the foregoing bond is such that whereas the above bound Elkana Craycraft has been employed or elected superintendent of the waterworks of the town of Salem, in Washington county, Indiana; now if the said Craycraft shall faithfully and impartially discharge his duties as such superintendent of the waterworks, according to law and contract, then this bond shall be void, otherwise to remain in full force and effect.”

Which several bonds in words as above set out were signed and acknowledged by the principal and the ^{two} sureties, the appellees herein. Appellant seeks to recover from the sureties on said bonds moneys collected as water rents by said Craycraft, which he appropriated to his own use and failed to account for.

The bonds declared upon in appellant's complaint are not official bonds; but the trustees of the town had the right to employ Craycraft as a superintendent in the management of the waterworks, and to accept a bond from him conditioned for the faithful performance of his duties as such superintendent, and he became in no sense an officer of the town by such employment: Burns' Rev. Stats. 1894, sec. 4257; Lafayette v. James, 92 Ind. 240; 47 Am. Rep. 140.

There is nothing in the record of this cause showing that the trustees of the town of Salem had by ordinance or resolution cre-

ated the office of superintendent of the waterworks, or by any ordinance or resolution defined or attempted to define the duties of a superintendent of waterworks.

The word "superintendent," in its ordinary acceptation, means, one who superintends, a director, and overseer; and, in the absence of an undertaking defining, fixing, and enlarging his duties, his duties must be taken to be such, and such only, as the ordinary acceptation of the word would imply. There is nothing in the word "superintendent," in the common use of it, which implies that he shall be a collector of moneys, much less a financial agent for the settlement of accounts and the handling of the revenues of a city or town: *Lafayette v. James*, 92 Ind. 240; 47 Am. Rep. 140.

The sureties upon the bonds in this cause promise to answer for the default of the principal, Elkana Craycraft, as superintendent of the waterworks, in the ordinary meaning of the word, unless, as appellant contends, the words, "according to law and contract," create a different liability.

⁶⁸¹ The allegations of the complaint do not nor could they increase or change the obligations assumed by the appellees upon the bonds in suit: *Dunlap v. Eden*, 15 Ind. App. 575.

There is no general condition in the bonds that Craycraft shall in all things fully keep and perform the contract between himself and appellant; there is no provision therein of similar import; neither the fact of the existence of a contract between Craycraft and the appellant, the date of entering into such contract, nor any one, or part, or all of the obligations contained therein are in any way mentioned or referred to in the bonds executed by appellees. The bonds, we think, appear complete and perfect upon their face, and, in the absence of mistake, a new condition cannot be added: *Dunlap v. Eden*, 15 Ind. App. 575.

We are further of the opinion that where duties are imposed upon a principal in a bond, not official, which are not commonly attached to the position which he is filling, and no mention of such unusual and different duties is made in the conditions of such bond, that the sureties upon such bond can only be held for the default of the principal, in the performance of such duties as are plainly and commonly understood to belong to the class of employment by which the principal is designated.

It is well settled that sureties are favorites of the law, and are not bound beyond the strict terms of the engagement, and their liability cannot be extended by implication beyond the strict terms of the contract: *Weir Plow Co. v. Walmsley*, 110 Ind. 242;

Dunlap v. Eden, 15 Ind. App. 575; Post v. Losey, 111 Ind. 75; 60 Am. Rep. 677.

The court in the last-mentioned case says: "A surety is bound only by the strict terms of his engagement. He assumes the burdens of a contract without sharing its benefits. He has a right to prescribe the exact ⁶⁶² terms upon which he will enter into the obligation, and insist upon his discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, *non haec in foedera veni*—this is not my contract."

In the absence of any resolution of the trustees of the town of Salem, and in the absence of any ordinance fixing the duties of said Craycraft, which resolution or ordinance would have been open to the public, and in the absence of any condition in the bonds, declared upon in this action, extending said Craycraft's authority to the collection and accounting for the water rents, and in the absence of any statement in said bond mentioning or identifying any additional obligation imposed upon said Craycraft by contract with appellant, or that any contract between Craycraft and appellant in fact existed, we are of the opinion that the lower court did not err in sustaining the demurrers to each paragraph of the complaint.

Judgment affirmed.

SURETYSHIP—CONSTRUCTION OF CONTRACT.—A surety has the right to stand upon the strict terms of his obligation, when such terms are ascertained, and his liability is not to be extended by implication beyond those terms: *Shreffler v. Nadelhoffer*, 133 Ill. 536; 23 Am. St. Rep. 626, and note; *First Nat. Bank v. Gerke*, 68 Md. 449; 6 Am. St. Rep. 453, and extended note.

OFFICERS—OFFICIAL BONDS—LIABILITY OF SURETIES ON.—If an entirely new and distinct class of duties not germane to the office are imposed upon a public officer, his sureties are not liable to answer for the faithful performance of the added responsibilities: *County of Spokane v. Allen*, 9 Wash. 229; 43 Am. St. Rep. 830, and note. Sureties are not liable for extra-official acts or undertakings of their principal: *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177; 50 Am. St. Rep. 795, and note; nor for the faithful performance of new duties, subsequently imposed upon him, not appropriate to his employment, such duties not being regarded as within the contemplation of the sureties when the bond was executed: Extended note to *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 459.

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[16 INDIANA APPEALS, 662.]

EXECUTORS AND ADMINISTRATORS—POWERS OF SPECIAL ADMINISTRATOR.—Under a statute declaring the powers of a special administrator to be "to collect and preserve the property of the testator or intestate until demanded by an administrator or executor duly authorized to administer the same, when such special letters shall be deemed to be revoked," such special administrator has no power to enter into an agreed case in relation to money of the estate collected by him and to pay it out on a claim under an order of court made in such case.

PRACTICE—PLEADING—DEMURRER.—A paragraph of an answer pleaded in bar of the entire action is subject to demurrer if it does not answer the entire complaint.

INSURANCE—ASSIGNMENT.—A life insurance policy is a chose in action and may be assigned.

INSURANCE—ORAL ASSIGNMENT.—A parol assignment of a life insurance policy, made by the insured to his wife, is valid if the policy does not declare an assignment without the consent of the company void.

INSURANCE—CHANGE OF BENEFICIARY.—Although, generally, the insured is bound to make a change of his beneficiary in the manner pointed out by the policy and by-laws of the association, yet if it is beyond his power to comply literally with such regulations, a court of equity may treat the change as having been legally made.

INSURANCE—EQUITABLE ASSIGNMENT.—If an insured instructs the general agent of the life insurance company by letter to change his policy payable to his estate so as to make it payable to his wife, an equitable assignment of the policy is effected, although such change is not made until after the death of the insured.

INSURANCE—ASSIGNMENT—INSOLVENCY.—If a person takes out a policy of insurance on his life and subsequently assigns it to his wife, child, or other dependent relative, the mere fact that the assignor is insolvent at the time of making the assignment does not warrant the inference that the assignment was in fraud of his creditors.

INSURANCE—ASSIGNMENT—INSOLVENCY.—An assignment by an insolvent husband of his life insurance policy to his wife is valid as against his creditors, although the policy was taken out only two years before such assignment and the death of the insured.

M. E. Clodfelter, C. L. Thompson, G. D. Hurley, and F. W. Hurley, for the appellant.

G. W. Paul and H. D. Van Cleave, for the appellees.

663 **COMSTOCK, C. J.** The complaint in this case is upon the bond of a special administrator, George N. Tomlinson, and his sureties, William Tomlinson and David Hartman.

The complaint is in two paragraphs. A copy of the bond is filed with each paragraph.

The breaches of the bond assigned are that Tomlinson, special administrator, received the sum of nineteen hundred and seventy-one dollars and eighty-eight cents which he converted to his own

use and the use of others; ⁶⁶⁴ 2. That said special administrator failed to preserve the property of the estate which came into his hands; 3. That said special administrator had knowledge of a large amount of personal property belonging to the estate, and failed and refused to preserve the same for the use of the estate; 4. That two thousand dollars came into the hands of said special administrator which he wasted and wrongfully turned over to others, whereby the same was lost to the estate.

The breaches of the bond assigned in the second paragraph of complaint are in effect the same as those assigned in the first.

The appellee, G. N. Tomlinson, filed his separate answer in three paragraphs. The first is a general denial. The second alleges, in substance, that in March, 1894, he was duly appointed and qualified as special administrator of the estate of Austin L. Tomlinson, late of Montgomery county, Indiana, deceased, with bondsmen, as set out in the complaint; that after his appointment there came into his hands the sum of nineteen hundred and seventy-one dollars and eighty-five cents from a certain insurance policy upon the life of his decedent; that Edith Tomlinson, the widow, claimed the money as her own, and demanded the same of him; that she had been substituted as beneficiary in said insurance policy, and threatened to bring suit against this defendant (appellee) for the recovery of the same; and that, being unwilling to pay her said money without an order of court, he and the said Edith Tomlinson, by agreement, in good faith, on an agreed statement of facts submitted the question of ownership of said money to the circuit court of Montgomery county, Indiana, and thereupon the court found and adjudged that said money belonged to said Edith, and rendered judgment in her favor, ⁶⁶⁵ and against appellee, and ordered appellee to pay said money to her, and that afterward, upon the faith of said order, appellee, acting as such trustee, paid to the said Edith the sum of fourteen hundred and seventy-one dollars and eighty-eight cents being the full amount of said money after deducting five hundred dollars therefrom, which he had paid for funeral expenses of decedent on the order of court, with the consent of said Edith; that he paid said balance to the said Edith on the twelfth day of April, 1894, and on the sixteenth day of April, 1894, he filed in said circuit court his report in final settlement of his said trust, showing his compliance with the order of the court; which said report the court approved, and discharged appellee and his sureties from all liability on the bond in suit, which order of approval and discharge were duly entered in the proper record of said circuit court; that this is the

same money claimed by the relator and set out in his complaint.

The third paragraph alleges that the money mentioned in complaint did not belong to said estate, but did of right belong to Edith Tomlinson, widow aforesaid, and the administrator had no right to the same.

For first paragraph of reply to the second paragraph of the separate answer of appellee, George N. Tomlinson, appellant, alleges in substance that appellee's appointment as special administrator was procured by fraud and collusion between the special administrator and Edith Tomlinson for the purpose of defrauding the creditors of said decedent; and as a part of the scheme the agreed statement of facts was entered into and submitted to the court, and the order procured for the payment of money to the widow aforesaid.

The second paragraph of appellee's reply to second paragraph of answer admits the filing of the agreed statement of facts entered into by and between the ^{ess} special administrator and Edith Tomlinson, and that the court on said statement adjudged that the proceeds of said policy belonged to said widow, and ordered the payment of the same to her, but avers that the court had no jurisdiction to make such order upon said statement; that the estate was largely indebted, and the order procured for the purpose of defrauding the creditors of the estate, and that after the appointment of the general administrator, relator herein, and upon petition, to which Edith Tomlinson and George N. Tomlinson were made parties, procured the order of said court vacating said order; that the judgment setting aside the order made upon said agreed statement of facts was in full force and effect.

The fourth paragraph of reply to the third paragraph of answer of George N. Tomlinson alleges that George N. Tomlinson having procured himself to be appointed special administrator, having obtained the policy and presented it to the insurance company as special administrator, having surrendered it and received the money thereon, and deposited it in his name as special administrator, etc., he could not afterward dispute the fact that it was his duty to receive the assets of the estate, preserve the same, and turn them over to the regular administrator.

There was also a general denial.

Demurrers to the second and third paragraphs of answer were overruled. Demurrer to the fourth paragraph of reply was sustained and overruled as to the first and second. There was a trial had, and, upon request of appellant, the court made a special finding of facts, and stated its conclusions of law.

The first error assigned is overruling appellant's demurrer to second paragraph of separate answer of appellee, George N. Tomlinson. Appellee, by the facts averred in this paragraph, seeks to avoid liability on ⁶⁰⁷ the ground that he, as special administrator, and Edith Tomlinson entered into an agreed statement of facts concerning the ownership of the proceeds of the insurance policy upon which the court ordered the special administrator to pay the money to her, and that after he had complied with the order of the court he made a report of said trust, and resigned therefrom, which report was approved, his resignation accepted and he discharged; that this is the money referred to in the complaint.

This paragraph, while addressed to the whole complaint, does not answer that portion of it which avers that the special administrator "wholly neglected and refused to receive more than five hundred dollars of the property and assets of said estate which came to his knowledge and suffered and permitted the same to be wrongfully taken by others and converted to their own use."

The complaint charges a neglect of duty as to money and other assets which he refused to receive. This allegation is not met by this allegation of answer. The demurrer, therefore, should have been sustained: *Farman v. Chamberlain*, 74 Ind. 82; *Dunn v. Barton*, 2 Ind. App. 444.

The demurrer should have been sustained for another reason. The powers of a special administrator are declared to be by statute "to collect and preserve the property of the testator or of the intestate until demanded by an executor or administrator duly authorized to administer the same when such special letters shall be deemed to be revoked": *Burns' Rev. Stats.* 1894, sec. 2391; *Rev. Stats.* 1881, sec. 2237. The question is passed upon in *Tomlinson v. Wright*, 12 Ind. App. 292.

The court says, in speaking of the special administrator, appellee in this case, and of the money realized from the insurance policy mentioned in the answer, ⁶⁰⁸ that "all he [special administrator] was authorized to do with it was to hold and possess it until an administrator shall be appointed, and then pay the same to him. He had no authority to allow or to pay claims or to enter into an agreed case in relation to the money which he had collected as such special administrator": See, also, *Cole v. Lafontaine*, 34 Ind. 446.

The third paragraph of the answer is addressed only to the averment of money in the complaint, alleging that it did not belong to the estate of Austin L. Tomlinson. It is pleaded in bar of the action, and as it does not answer the entire complaint, the

demurrer should have been sustained: *Farman v. Chamberlain*, 84 Ind. 446.

The fourth assignment of error is the sustaining of the demurrer to the fourth paragraph of reply to the third paragraph of answer of appellee.

It is pleaded as an estoppel, but as we have held that paragraph of answer insufficient, it is not necessary to discuss this ruling.

The court, in the special finding of facts, found that Austin L. Tomlinson was, on the first day of March, 1894, and for a long time prior thereto had been, a resident of Montgomery county, Indiana, and that on said date, while temporarily sojourning at Fullerton, California, he died intestate; that on the third day of March, 1894, George N. Tomlinson was, by the clerk of the circuit court of Montgomery county, in vacation, appointed special administrator of the estate of said deceased and executed his bond with his codefendants in this action, William Tomlinson and David Hartman as his sureties, which is the bond sued on in this action; which bond was duly approved, and he immediately thereafter qualified and entered upon the discharge of his duties as such special administrator; that on the twenty-sixth day of January, 1892, the said ⁶⁶⁹ Austin L. Tomlinson, then an unmarried man, obtained a policy from the Equitable Life Assurance Society of the United States, a corporation organized under the laws of the state of New York, with its home office in New York City, insuring his life in the sum of two thousand dollars, made payable to his estate, which policy was in force at the date of his death; that the mode provided by said society for assigning policies or changing the beneficiary required the holder of the policy desiring the transfer or change, to make out an application to the company giving the number and date of policy and full name of beneficiary, which application should be accompanied by one dollar to pay for issuing a new policy; that no such application was ever made, and that no new policy was issued; but that such mode was not stated in or on the policy; that on the fifteenth day of February, 1893, the said Austin L. Tomlinson married one Edith Guthrie, who continued to be and was his wife at the time of his death, and he had one child by her still living; that on the fourth day of January, 1894, said Austin L. Tomlinson was the owner and in possession of a stock of groceries in Crawfordsville, Indiana, of the value of eight hundred dollars; that he had been engaged in the grocery business for more than two years prior to that date; that he had notes and obligations owing him, the proceeds of said business, amounting to more than three thousand

dollars; that he was indebted to divers persons, firms, and corporations for goods purchased in carrying on said business, the sum of four thousand dollars; that all of said groceries, notes, and obligations were in his lifetime applied to the payment of said indebtedness, and no part of the same came into the hands of said special administrator; and that on the date of his death said Austin L. Tomlinson had no rights, credits, property, or choses in action in the state of Indiana, except said ⁶⁷⁰ policy of insurance; that immediately after his appointment, said special administrator demanded and received of said Equitable Life Insurance Company payment of said policy the sum of nineteen hundred and seventy-one dollars and eighty-eight cents, and gave his receipt therefor as special administrator; that he paid out for funeral and burial expenses of said Austin L. Tomlinson, and court costs five hundred dollars, taking receipts therefor as special administrator. That on the forenoon of his death the deceased caused to be prepared, signed, acknowledged, and caused to be mailed to the general agents of said Equity Life Assurance Company, at Indianapolis, the following instructions:

Fullerton, Cal., March 1, 1894.

"To Richardson & McCrea, Gen. Agents Eq. Life Assurance Co. of N. Y., Indianapolis, Indiana.

"Gentlemen: Please have life insurance policy taken out by me (A. L. Tomlinson) in 1892 for the amount of two thousand dollars, and made payable to my estate, transferred, and instead have the amount of said policy made payable to my wife, E. L. Tomlinson. (Signed) A. L. TOMLINSON."

That he executed the foregoing instrument for the purpose of having said policy transferred and made payable to his wife; that before deceased left his home for California, he expressed his intention of giving said policy to his wife, and after her arrival at Fullerton he informed her that he had done so; that the agents of said Equity Assurance Company received said letter after the death of said Austin L. Tomlinson, and answered the same on the 6th of March, 1894, giving instructions as to the manner in which he should make out the application for change of beneficiary in his policy. The court further found that between the tenth day of March, 1894, and the first day of April, 1894, said letter of the insurance company ⁶⁷¹ came into the possession of said Edith Tomlinson, and she and the said George N. Tomlinson placed the same in the hands of Paul & Bruner, attorneys of the said special administrator, and said attorneys, after having advised with the

said widow and special administrator, prepared an agreed statement of facts which was signed and verified by the said widow and special administrator; said agreed statement of facts recites the fact of said Austin L. Tomlinson having taken out the insurance policy heretofore referred to in favor of his estate, his subsequent marriage to said Edith, the birth of the child, the failure of the health of the said Austin, his trip to California for the benefit of his health, his letter to the insurance company requesting the change of beneficiary, the answer of the assurance company to said request; that he did not have said insurance policy; that it was at his home in Crawfordsville in the possession of his wife; that his wife had not accompanied him to California; that several days before he died he had expressed his desire and intention of transferring said policy to his wife, but was persuaded to wait until her arrival; that she not arriving, and fearing to wait longer, he made the assignment, thinking it sufficient to transfer all rights in the same to her; that George N. Tomlinson was appointed administrator, and was ignorant that said policy had been transferred; that deceased left no estate unless the policy belonged to the estate; that relying on the fact that said policy belonged to the estate, he had advanced expenses of last sickness and funeral expenses of deceased in the sum of five hundred dollars; that on the second day of April, 1894, said assurance company paid the amount due on the policy, nineteen hundred and seventy-one dollars and eighty-eight cents, to the special administrator, which amount is claimed by said widow, and asking the court to determine to whom said money belonged and to make such order as ⁶⁷² the court deemed to be right. That said attorneys, Paul & Bruner, on the twelfth day of April, 1894, presented the said agreed statement of facts to the judge of the circuit court of Montgomery county in chambers; that the same was filed and docketed in said court, and on said day, upon said agreed statement of facts, said court ordered and decreed that the proceeds of said policy, nineteen hundred and seventy-one dollars and eighty-eight cents, belonged to said Edith Tomlinson, and entered judgment in favor of said Edith and against said special administrator. The court further finds that, in pursuance of said order, said special administrator paid to said Edith Tomlinson the proceeds of said policy, after deducting five hundred dollars expended as aforesaid, viz., fourteen hundred and seventy-one dollars and eighty-eight cents, which sum she receipted to him for as special administrator; that on the sixteenth day of April, without any notice to the heirs or creditors, said special administrator presented to

the court his final settlement report showing the receipts and expenditures as hereinbefore stated, and the payment to said Edith Tomlinson of the sum aforesaid, and that he had no other property or assets in his hands as special administrator; that he asked that his report be approved, and that he be discharged as special administrator, and the court made an order approving said report and discharging said special administrator; that said Paul & Bruner received from the said Edith Tomlinson, for services rendered as attorneys in the matter of said estate and the procurement of said settlement, one hundred dollars out of said insurance.

That on the second day of May, 1894, Charles W. Wright, relator, the duly appointed and qualified regular administrator of said estate, filed his petition in said court, alleging, among other things, that said agreed statement of facts was procured, and the order and decree entered thereupon were obtained, by fraud practiced ⁶⁷⁸ upon the court by the said George N. Tomlinson as special administrator, and that the court had no jurisdiction of the subject matter to make such order upon such statement of facts; that said special administrator had no authority to make such statement of facts with said Edith Tomlinson; that said order was fraudulent and void, and that the same should be set aside and vacated. That on the twenty-fifth day of May, 1894, the court sustained said petition and entered a judgment setting aside and vacating said order and decree and all orders and decrees made under the same. The court further finds that all orders and decrees under said order and judgment were by said court upon said petition set aside and vacated, the court stating as a reason that it had no jurisdiction to make the same. That the said special administrator and said Edith Tomlinson were parties defendant to said petition, and appeared thereto by their attorneys, Paul & Bruner, and filed answers to said petition and resisted the vacation of said judgment so made upon said agreed statement of facts; that afterward the said George N. Tomlinson and said Edith Tomlinson appealed to the appellate court of the state of Indiana from said judgment vacating the order and judgment upon said agreed statement of facts; that the judgment so appealed from was afterward by said appellate court affirmed.

That claims have been filed against the estate of A. L. Tomlinson and allowed to the amount of fourteen hundred dollars, which remain wholly unpaid; that said George N. Tomlinson had knowledge of such indebtedness when he made said agreed statement of

facts and at the time he paid said money to said widow; that in connection with the order vacating the judgment on the agreed statement of facts, the court made the following ⁶⁷⁴ order: "And it is further ordered by the court that the further proceedings in the cause No. 2418 probate docket, that the plaintiff, W. Wright (relator), present administrator be substituted for George N. Tomlinson, formerly special administrator, and that George N. Tomlinson and Edith Tomlinson be made defendants, and that said administrator frame and tender issue to defendants that will determine the ownership of a certain insurance policy mentioned in the agreed statement of facts made on record in a former hearing of this cause, and also determine the right to the proceeds of said policy, and the said Wright is ordered to institute proceedings as above indicated and prosecute the same to a speedy and proper conclusion." And the court finds that relator did not obey said order. As a conclusion of law the court stated that the plaintiff had no right of recovery.

The court having found as facts that the decedent left no assets in the state of Indiana at his death to the possession of which a special administrator would have been entitled, unless said insurance policy belonged to his estate, and that the order made and entered upon the agreed statement of facts had been vacated and set aside, we cannot see that the appellant was harmed by the ruling of the court upon the demurrer to the second paragraph of appellee, George N. Tomlinson's answer.

The appellate court, in *Tomlinson v. Wright*, 12 Ind. App. 292, in affirming the judgment vacating the order made upon the agreed statement of facts, was careful to say that the merits of the controversy were not before it and that the only question it deemed necessary to consider was, whether the special administrator possessed such power as authorized him to enter into such an agreement with the widow of decedent, adding: ⁶⁷⁵ "It is true as a matter of course, if the appellant, Edith Tomlinson, was the equitable owner of the policy of insurance, then the administrator, whether special or general, had no right thereto, nor to the proceeds thereof as against her. If, on investigation by the court having jurisdiction of the parties and of the subject matter of the controversy, it is found that said Edith was, at the death of her husband, entitled to the money, the appellee will not be entitled to recover against appellants or either of them."

The court makes no finding that the relator was entitled to the proceeds of said policy, nor is there any finding of fraud on the

part of the special administrator or said Edith Tomlinson. The burden was upon the relator (appellant) upon both of these averments of the complaint.

A life insurance policy is a chose in action and may be assigned. Appellant contends that the common law will be presumed to be in force in California when the insured directed the change of beneficiary in the policy, and that, under the common law, choses in action are not assignable. Admitting that, under the common law, the policy could not be assigned so as to pass the legal title to the instrument, or the money, yet a transfer would be regarded as an equitable assignment and enforced in equity: *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398.

When the policy does not declare an assignment without the consent of the company void, a parol assignment is valid: *O'Brien v. Prescott Ins. Co.*, 57 Hun, 589.

Knowledge of the assignment of a life insurance policy is important to the insurer to prevent the possibility of its being compelled to pay both the assignee and the legal representatives of the insured.

In fire insurance policies there is generally a condition ^{or} that any assignment will be void, without the assent of the insurer be first obtained. The reason is obvious—a company may be willing to issue a policy to one person and not another: *Robinson v. Cator*, 78 Md. 72.

A life insurance policy may be transferred by delivery without writing: *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625.

A husband may orally assign a policy of insurance on his own life to his wife: *Chapman v. McIlwrath*, 77 Mo. 38; 46 Am. Rep. 1.

In *Grand Lodge etc. v. Child*, 70 Mich. 163, in which case the certificate of membership made the betrothed of the insured beneficiary—he retaining the certificate in his possession—she married another, and, the certificate having been lost, he made a statement of the loss and applied for a reissue of the certificate to his son as beneficiary, and the application was refused; the rules of the organization required the change to be indorsed on the original certificate. By the advice of the officers of the organization, he attempted to make the change of beneficiary by giving power of attorney to collect the amount which should accrue under the certificate. The court held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund.

The general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-

laws of the association is subject to exceptions, and one is, that if it be beyond the power of the insured to comply literally with the regulation, a court of equity will treat the change as having been legally made: *Supreme Conclave v. Cappella*, 41 Fed. Rep. 1.

In short, subject to the claims of creditors to avoid ⁶⁷⁷ a transfer made in fraud of their rights, any act which indicates an intention to transfer the interest in the policy, whether voluntarily or for a consideration, will be held good: *Bliss on Insurance*, sec. 821.

From the findings of the court there can be no question as to the intention of the insured to transfer to his wife his rights in the policy under consideration, and in the light of the authorities cited, and many others to the same effect, there can be no doubt that an assignment in equity was made valid as to everyone, unless the creditors of the assured are to be excepted.

Can this equitable assignment made by an insolvent debtor be upheld against the creditors?

It is the duty of the husband and father to provide reasonably for his dependent family. The law favors the making of reasonable provision by a man for his dependent family, and in *Johnson v. Alexander*, 125 Ind. 575, the supreme court of Indiana has said: "It is not a violation of the statute, and in fraud of creditors for a debtor, though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family."

In *Pence v. Makepeace*, 65 Ind. 345, it is held that only on the clearest proof of fraud, if at all, can the premiums paid by an insolvent debtor on a policy of insurance on his life for the benefit of his wife and children be revoked by his creditors, and in no event can any excess over the amount of the premium so paid be recovered.

To the same effect is *Washington Cent. Bank v. Hume*, 128 U. S. 195. In 2 *Bigelow on Frauds*, page 129, it is said: "A debtor, though insolvent, may use his earnings to pay for insurance on his life, in favor of his family."

In *McCutcheon's Appeal*, 99 Pa. St. 133, it is held that when a person takes out a policy of insurance ⁶⁷⁸ upon his own life and subsequently assigns the same to his wife, child, or other dependent relative, the mere fact that the assignor in such case is insolvent at the time of making the assignment does not warrant the inference that the assignment was in fraud of creditors.

Authorities in the same line, to the same effect, might be multiplied, but it is not necessary. There is nothing in the findings of the court to show bad faith; on the contrary, they show a com-

mendable desire on the part of the husband to make some provision for his wife and child. The policy was taken out in January, 1892, and transferred March 1, 1894, at which date the insured died. At most, his creditors are injured if the transfer is upheld by the amount of premium paid for two years. The amount might have been ascertained in the proceedings which appellant was ordered by the court below to institute, to determine the ownership of the insurance policy in question, which order of court he failed to obey. In our opinion, the transfer of the policy was valid and not in fraud of creditors. Upon the effect of the setting aside of the order made on the agreed statement of facts to pay the widow the balance of the proceeds of the insurance policy, after the special administrator had paid to the widow under said order said balance, we deem it only necessary to say that trustees, acting under orders of the court having jurisdiction of the subject matter will be protected thereby. If, by reason of such order or decree, money is paid to one not entitled thereto, the protection afforded to the trustee is not extended to the person so paid. In such cases, the party really entitled to the money, if not a party to the previous suit and bound by the decree, may have suit against the person to whom the money is paid.

379 We find no error for which the judgment of the court below should be reversed.

Judgment affirmed.

INSURANCE—LIFE—CHANGE OF BENEFICIARY.—A change in beneficiaries cannot be made except by a substantial compliance with the regulations of the society, and yet courts of equity recognize exceptions to this general principle. Equity does not demand impossible things, and will consider as done that which should have been done, and when a member has complied with all the requirements within his power, he has done all that a court of equity demands: *Jory v. Supreme Council*, 105 Cal. 20; 45 Am. St. Rep. 17; *Rollins v. McHatton*, 16 Colo. 203; 25 Am. St. Rep. 260; Monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 562.

INSURANCE—LIFE—ASSIGNMENT OF POLICY—VALIDITY OF.—Insurance policies are choses in action for the payment of money, and their assignment is authorized in Maryland: *New York Life Ins. Co. v. Flack*, 3 Md. 341; 56 Am. Dec. 742, and monographic note. A husband may orally assign a policy of insurance on his own life to his wife: *Chapman v. McIlwrath*, 77 Mo. 38; 46 Am. Rep. 1. Of course, if a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect: Monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 566.

INSURANCE—ASSIGNMENT OF POLICY—WHEN VOID AS IN FRAUD OF CREDITORS.—It has been frequently held that as against creditors, one's assignment, when insolvent, of insurance policies on his own life, to or for the benefit of wife or children, or either, constitutes a fraudulent transfer within the statute, and this

even though the debtor may have no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such fund from them and dealt with it by way of bounty: Monographic note to *Hise v. Hartford Life Ins. Co.*, 29 Am. St. Rep. 360. See *Appeal of Elliott*, 50 Pa. St. 75; 88 Am. Dec. 525, and extended note.

EXECUTORS AND ADMINISTRATORS—SPECIAL ADMINISTRATOR—POWERS OF.—The powers of a special administrator under the Iowa Revised Laws of 1848 are limited to the preservation of personal property of the decedent until a regular administrator can be appointed, and an order of the probate court directing a sale of real estate by a special administrator would, under such statute, be without authority of law and void: *Long v. Burnett*, 18 Iowa, 28; 81 Am. Dec. 420. See *Fisk v. Norvel*, 9 Tex. 13; 58 Am. Dec. 128.

CASES
IN THE
SUPREME COURT.
OF
IOWA.

KLOTZ v. JAMES.

[96 IOWA, 1.]

EVIDENCE—FRAUD—CROSS-EXAMINATION.—If, in an action to recover attached property under a claim of purchase before attachment, the original owner gives evidence tending to show good faith in the sale, it is proper to allow full cross-examination on all the circumstances bearing on good faith.

SALES—FRAUD—RETURN ON ATTACHMENT AS EVIDENCE.—If, in an action to recover attached property under a claim of purchase before attachment, the attachment is defended on the ground that the purchase was fraudulent and the jury so finds, it is harmless error to admit in evidence the return on attachment tending to show that the attachment levy was defective, as, under the finding, the plaintiff is not entitled to the property, and his rights cannot be made to depend on whether the levy was valid or not.

WITNESSES—IMPEACHMENT—PRIOR TESTIMONY.—The evidence of a witness taken on a prior examination may be used to contradict his subsequent evidence, when his attention is called to his prior testimony before his later examination, and the stenographer who took the first testimony testifies that he took it correctly, reduced it to writing, and that he can, and by a reference to his notes does, state such testimony as given.

APPELLATE PRACTICE—OBJECTION NOT RAISED BELOW.—An objection that a money judgment in replevin includes property not taken under the writ cannot be first made on appeal.

APPELLATE PRACTICE—GENERAL ASSIGNMENT OF ERROR.—An assignment of error on appeal that "the court erred in rendering judgment for the defendant" is too general to be considered; it should point out the specific error objected to.

C. A. Irwin, for the appellants.

Mack & Deland and A. D. Bailie, for the appellee.

² GRANGER, J. 1. The defendant is sheriff of Buena Vista county, and as such seized, by virtue of certain writs of attachment, a store building, stock of goods, and other personal property, as belonging to one Henry Boese. The plaintiff brings this action to recover the property, claiming to be the owner by

virtue of a purchase thereof from Boese before the levy of the attachments. The answer puts in issue the validity of the sale, and avers it to be fraudulent as to creditors. The plaintiff used Henry Boese as a witness to identify the bill of sale as signed by him, which is dated August 18, 1893; also, to show that he owned the goods up to the date of the sale to the plaintiff, and ³ that, when the defendant came to take the property by virtue of the writs of attachment, he told him that he had sold the property to the plaintiff. On cross-examination, the court permitted a full examination into the particulars of the transaction as bearing on its bona fides. We think that there was no error in the holding, in view of the evidence given on the direct examination. The effect of the direct examination was to show, or justify a conclusion by the jury, that there had been a valid or good faith sale of the property. If so, it was proper, on cross-examination, to disclose the circumstances of the transaction when fraud was pleaded.

2. The defendant offered in evidence the returns of the several writs by which he held the property. Plaintiff objected to the evidence for the reason that the returns did not show that notice had been served on the attachment defendant, or on any person in possession of the property. The same question was presented in other ways, by questions and offers to show that no such notice had been served. The returns were admitted in evidence, and the court denied a motion to strike the writs and returns from the evidence because of the want of such a notice. Plaintiff complains of the action of the court in this respect. Reliance is placed on the code, section 2967, which provides the mode of attachment, as follows: "By giving the defendant in the action, if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment." Reliance is also placed on authorities like the following: *Crawford v. Newell*, 23 Iowa, 453; *Phillips v. Germon*, 43 Iowa, 101; *First Nat. Bank of Newton v. Jasper County Bank*, 71 Iowa, 488; *Sioux Valley etc. Bank v. Kellog*, 81 Iowa, 124; *Commercial Nat. Bank v. Farmers' etc. Nat. Bank*, 82 Iowa, 198. ⁴ These authorities clearly sustain the rule that, to constitute a valid levy, the requirement of the statute must be observed. But is the rule applicable to this case? The property was in the possession of the defendant by virtue of the attachments, whether legally so or otherwise. The plaintiff's claim to the possession is not because the possession of defendant was illegal, for want of a valid levy of the writs, but

because he owned the property; and his right of recovery was as perfect and complete if the levy had been attended with a notice as without it. His right of action is in no way based on a defective levy. The answer is in two divisions, the first being based on the fact of the holding under the writs; and the second on allegations that the plaintiff is not the owner of the property, because of fraud in the attempted sale of it to him. The jury returned a special finding that the sale was fraudulent. That is a judicial determination that he does not own the property, and has no right to the possession. If plaintiff is not the owner, and hence has no interest in the property, he is in no position to question the validity of defendant's possession. If he is entitled to the possession of the property, it is because he owns it, and not because defendant's possession is illegal. It is for those who have rights in the property to question defendant's holding. As to the finding of fraud, it must have been the same, regardless of the rulings of the court as to the notice, for the fact of notice could in no way affect the conclusion as to fraud. Inasmuch as the plaintiff was entitled to the possession of the property, if he owned it—that is, if the sale was valid—regardless of the validity of the levy, we do not see how the question of its validity was material, under the issues presented in the second division of the answer. What might have been the situation without the second division of ⁵ the answer and the special finding, we need not consider. The record makes it conclusive that the ruling was without prejudice, if not technically correct.

3. Certain witnesses were used to prove the value of the stock of goods and of the building. It is urged that they were not shown competent; but we think that, while in some cases the showing of knowledge was meager, there was no prejudice, with an opportunity to cross-examine and show the real value of the testimony.

4. At an examination before Judge Thomas, some time before the trial, Henry Boese was examined, and his testimony was reduced to writing, in shorthand, by Mrs. Wedgwood. Boese was also a witness on the trial of this case, as we have before noticed, and his testimony on both examinations was as to the sale of this property. Mrs. Wedgwood was a witness in this case for the defendant, and after testifying that she reduced the testimony of Boese before Judge Thomas to writing, and stating that she took the testimony correctly, and could state his testimony as then given, she was permitted, against objections, to examine the notes and state his testimony. The object was to contradict his

statements on the trial as to the consideration to him for the transfer of the property to the plaintiff. It is urged that a proper foundation was not laid to justify the contradiction. This claim is likely based on appellant's abstract. The abstract by appellee shows that on the examination in this case the attention of the witness was called to his former examination, so as to warrant the contradiction.

5. A notice designed to comply with the requirements of section 1, chapter 45, of the acts of the twentieth general assembly was served on the defendant prior to the commencement of this action. The notice is in the record, and also a stipulation, made during the trial, ⁶ that such a notice was served. The court submitted to the jury the question of the sufficiency of the notice, and the jury found specifically that it was not sufficient. It is urged that it was error to submit such a question: 1. Because no such question was presented by the pleadings; and 2. Because if such question was presented, it was one for the court. We need not determine either question, because the service of the notice was but a condition precedent to a liability of the defendant sheriff. It had no other purpose. In view of the finding that the sale was fraudulent, had it been conceded on the trial that the notice was sufficient, the result of the case must have been the same. The admitted evidence had no bearing whatever on the question of fraud, and the result, as to the fraud, was not affected by the rulings. The significance of the special finding of fraud in the sale is such that there can be no reversible error in the record unless error is involved in, or affects, the proceeding leading to the conclusion of fraud.

6. After verdict the defendant elected to take a money judgment for the value of his interest in the property, which was the full value of the property. The court entered judgment for six hundred and forty-two dollars. A building which the jury assesses to be the value of one hundred and fifteen dollars is included in this amount. The return of the coroner to the writ of replevin shows that the building was not seized by virtue of it. The building then remained in the possession of the defendant. Appellant says that it was error to enter judgment for the value of the building under such a state of facts. If it be conceded that the position is correct, we do not see that appellant can now take advantage of it. It does not appear that this particular matter was called to the attention of the court below, nor do we find an ⁷ exception to the judgment which followed the overruling of the motion for a new trial. After the overruling

of such motion, there seemed to be no objection to the judgment as entered. It may further be said that no assignment of error is sufficiently specific to present the matter in this court. The general assignment that "the court erred in rendering judgment for the defendant" was directed to the entire judgment. It should point out the very error objected to, in as specific a way as the cause will allow: Code, sec. 3207.

There is a claim that some of the instructions are erroneous, but it seems to be based on appellant's abstract. The amendment by appellee so changes the record that the claim is not well founded.

The judgment is affirmed.

WITNESSES — IMPEACHMENT — PREVIOUS CONTRADICTIONARY STATEMENTS.—Depositions of witnesses taken before a trial are inadmissible to impeach the testimony of the same witnesses, given at the trial, unless the proper foundation is first laid by directing the attention of the witnesses to the particular matters involved in the supposed contradiction, and giving them an opportunity to explain: *Hammond v. Dike*, 42 Minn. 273; 18 Am. St. Rep. 503. See, also, *Jackson v. State*, 83 Tex. Crim. Rep. 281; 47 Am. St. Rep. 30, and note; *Anderson v. State*, 34 Tex. Crim. Rep. 546; 53 Am. St. Rep. 722.

APPEAL.—A QUESTION NOT RAISED AT THE TRIAL will not be considered for the first time on appeal: *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

APPEAL.—EXCEPTIONS ON APPEAL must be specific, pointed, and explicit; and, if indefinite, cannot be considered: *Atkins v. Field*, 89 Me. 281; 56 Am. St. Rep. 424, and note. A rule of court requiring specific assignments of error is violated by an assignment of error to the effect that the charge of the trial court, taken as a whole, was not a full and fair presentation of appellant's claims or of the questions of law involved, as this is a mere general assignment of alleged error: *Kimberly's Appeal*, 68 Conn. 428; 57 Am. St. Rep. 101, and note.

WITNESSES — CROSS-EXAMINATION.—Cross-examination extends only to subjects covered by the direct examination: *Enos v. St. Paul etc. Ins. Co.*, 4 S. Dak. 639; 46 Am. St. Rep. 796, and note; *Harkey v. State*, 33 Tex. Crim. Rep. 100; 47 Am. St. Rep. 19.

PARK v. CHAPLIN.

[93 IOWA, 55.]

RELIGIOUS ASSOCIATIONS—PROPERTY OF—DIVERSION.—Property given or set apart to a church or religious association for its use in the enjoyment and promulgation of its adopted faith and teachings is by such association held in trust for that purpose, and any members of such association less than the whole have no power to divert it therefrom.

RELIGIOUS ASSOCIATIONS—POWER TO DIVERT PROPERTY OF.—A church or religious association incorporated as a certain branch of a particular creed or denomination, cannot, without the consent of all of its members, transfer its property acquired for its benefit as such corporation to another branch of the same denomination or creed holding different doctrines and beliefs.

RELIGIOUS ASSOCIATIONS—PROPERTY RIGHTS—RIGHT TO DIVERT.—Although a church or religious association incorporated as a branch of a certain denomination has become a member of a higher body of the same denomination with power only in ecclesiastical matters, the rules of which provide that a church in good standing as a member shall, on request for dismissal to another denomination or branch of the same denomination, receive a letter of recommendation, this does not confer upon the first-named church association power to transfer without the consent of all its members to another denomination, nor to a branch of the same denomination, property acquired for its use as originally incorporated.

Action to enjoin a church incorporated as a branch of a certain denomination from withdrawing therefrom and uniting with a different branch of the same denomination, and from taking its property with it. A temporary injunction was granted and on motion dissolved. Plaintiffs appealed.

F. C. Platt, for the appellants.

Alford & Gates, for the appellees.

53 **ROBINSON, J.** The petition alleges and the answer admits the following facts: On the twenty-seventh day of April, 1868, the "Waterloo Free Will Baptist Society" was duly incorporated under the laws of this state as a religious association. The object of the association, as declared in the certificate of incorporation, was "the building and erection of a church or house of worship, and the diffusion of the gospel." In December, 1892, the certificate was so amended by a unanimous vote of the society as to change its name **54** to the "First Free Baptist Church of Waterloo," and provided for five instead of three trustees. On the fourth day of January, 1894, at a meeting held by members of the church, a resolution was adopted, a copy of which is as follows: "We, the members of the First Free Will Baptist Church of Waterloo, Iowa, resolve that the name of said church be changed from the one by which it has formerly been known to the 'Free Baptist Church of Waterloo, Iowa,' by which name it

shall hereafter be known, and that article 1 of its certificate of incorporation be amended accordingly." The article referred to was the one which gave the church its name. The petition also contains averments, some of which are not admitted by the answer, to the following effect: The amendment adopted in December, 1892, did not change the articles of faith or belief of the church. The church is under the patronage of the General Free Baptist Conference, and it is particularly under the patronage and is a member of the Cedar Valley Quarterly Meeting, a regularly constituted body, comprised of nine churches. The vote on the adoption of the resolutions of January 4, 1894, was twenty-five for, and five against, it. At the same meeting the following was adopted: "Resolved, that we, the members of the Second Baptist Church, of Waterloo, Iowa, appoint the trustees of said church a committee to inform the Baptist denomination that we, as a church, desire membership in their denomination, measures having been adopted by us which we trust will bring about such a union." This was voted against by the same persons who opposed the other resolution. The religious belief and the articles of faith of the Baptist Church or denomination are radically different from those of the Free Baptist Church, and each has a separate and distinct organization, and is governed by its own officers, laws, and ^{own} rules. The petition further alleges that, by the adoption of the two resolutions set out, the persons voting therefor declared their secession from the First Free Baptist Church of Waterloo, and from the General Free Baptist Conference, and from the Cedar Valley Quarterly Meeting, and thereby abandoned the religious belief and creed of the First Free Baptist Church of Waterloo, and then and there withdrew from that church; and that the property of the church was acquired for the purpose of advancing Christianity according to the religious belief, principles, and creed of the Free Baptist Church, to which the plaintiffs still adhere; that the property has been dedicated to the uses and purposes consistent with the religious belief and creed of that body; that the defendants are attempting to alienate the property of the Free Baptist Church of Waterloo, and to prevent the plaintiffs and others from enjoying those rights which have been assured them by the acquisition and dedication of that property to the purposes and uses of that church; that neither the General Free Baptist Conference nor the Cedar Valley Quarterly Meeting has, by vote or otherwise, expressed its approval of the proposed change in the certificate of incorporation of the First Free Baptist Church of Waterloo, and has not

been applied to for such consent; that if the instructions contained in the resolutions are carried out, a cloud will be cast upon the title of that church as to its real property in Waterloo, which is particularly described, and that the plaintiff and other members of the church who adhere to its religious belief will be threatened with the loss of the rights and privileges to which they are entitled as members of the church, if they are not actually deprived of them; that if the proposed amendment is adopted, the rights of the said persons will be unlawfully infringed and invaded, and the standing of the ⁶¹ church as a Free Baptist organization and its influence in the community for the promotion of the doctrines of the Free Baptist Church will be irreparably injured; and that the defendant trustees threaten to carry the resolutions into effect, and will do so unless restrained. The plaintiffs are two of the members of the First Free Baptist Church of Waterloo, and, as such, are in good standing. That church and its trustees are made parties defendant.

The defendants contend that the First Free Baptist Church of Waterloo is an independent body, not subject to the control of any superior body; that it is at liberty to form its own creed, and does now and has always regulated its own affairs, without any right of interference or control on the part of any superior or other body; that there is now no radical difference between the belief and articles of faith of that church and the Baptist Church; "that several years ago there was a very substantial difference in the articles of faith and religious beliefs of the two churches, but that for many years the two denominations have been gradually drawing nearer to each other in creed, belief, and articles of faith, the regular Baptist denomination having dropped from its creed, belief, and articles of faith the portions thereof, or the most of the portions thereof, which were repugnant to the early founders of the denomination of Free Will Baptists or Free Baptists. with which denomination the defendant church was heretofore affiliated. and at the same time the latter denomination has dropped from its creed, belief, and articles of faith, or modified, some of the tenets thereof which were originally repugnant to or materially different from the religious faith and belief of the regular Baptist denomination; that the tenets of belief of said denominations have changed, and can but change; that any attempt to anchor the beliefs of ⁶² denominations immovably in the stream of time is beyond human power, opposed to progress and advancement, and an effort to halt on the great onward march of thought." The defendants further allege that the defendant

church is weak in numbers; that few of them are possessed of large means; that in consequence it is impossible for the church to employ a regular or permanent pastor; that it has been without a pastor a portion of the time for several years; that in consequence many of its members have gone away, and now affiliate with other churches, and that if the resolutions are not carried into effect, other members will also attach themselves to other churches; that if the resolutions are carried out, and the Baptist denomination receives the church, its membership and revenue will be greatly increased, it will be enabled to employ a pastor permanently, and members will be prevented thereby from going to and affiliating with other churches, that it will not be necessary for any members to subscribe to the articles of faith of the Baptist denomination, because the articles of faith of the two churches are substantially the same; that if then unable to employ a pastor, assistance will be received from the Baptist denomination, which is the larger and stronger of the two; that the only effect of carrying out the resolutions will be to change the name of the church, and place it in the Baptist denomination; that the property of the church described in the petition was conveyed to it without qualification or limitation, and without dedication to any particular use or purpose; that it is held subject to the will of a majority of the church members, and that the cause of Christianity will be advanced by the making of the proposed change; that if it is made, the church, if received into the Baptist denomination, will continue to be a separate and independent body, with a perfect right to formulate and change its own ^{own} creed or religious belief. The defendants further aver that the property of the defendant church is held without dedication to any special use; that no trust is expressed in its deed or results from its ownership; and that this court has no jurisdiction in equity of the case, the relief, if any, to which the plaintiffs are entitled, being within the defendant church.

In addition to the facts admitted by the pleadings, the evidence shows the following: The terms "Free Baptists" and "Free Will Baptists" are identical in meaning, and are used to designate persons of the same religious belief who are members of the same denomination; and the change in name adopted by the defendant church in December, 1892, had no effect upon its creed or declaration of principles, nor upon its relation to other churches. The title to the church edifice and the lot upon which it stands is vested in the defendant corporation, the First Free Baptist Church of Waterloo; and unless the defendants are

prevented from carrying the resolutions of January, 1894, into effect, that organization will be withdrawn from the Free Baptist denomination, and, if received by the Baptist denomination, will become a part of it.

The change proposed, if accomplished, will transfer, not only the organization, but the property of the defendant church, to the Baptist denomination, and that will have the benefit of both the organization and its property, including that in controversy. We do not understand that any party to the action questions the fact that the property would go with the corporation; but it is claimed by the appellees that the defendant church is a civil corporation, in which a majority rules, and that each church, in both the Free Baptist and Baptist denominations, has the right to fix and adopt its articles of faith and covenant; that the only effect of the proposed change would be to ⁶⁴ place the defendant church in the Baptist denomination; and that it would there continue to be independent, without any change in its articles of faith or covenant.

The appellants claim: 1. That the church edifice, and the lot on which it is situated, have been dedicated to the use of the Free Baptist denomination, for the advancement of Christianity according to the religious beliefs of that denomination, and that, therefore, they cannot be transferred to any other denomination; 2. That the attempt to carry out the resolution in question is an effort to alienate the church property, and place it beyond the control of those who are adhering to the doctrine professed by the congregation and the form of worship in practice at the time of the dedication of the property and the creation of the trust; 3. That the appellees have not pursued the statutory provisions in regard to the changing of articles of incorporation of religious societies; 4. That a court of equity has jurisdiction to determine the questions affecting the property interests of the defendant church.

The questions we are required to determine are only those which relate to the property rights of the parties to this action "Civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but they will interfere with such associations when rights of property or civil rights are involved": *Bird v. St. Mark's Church*, 62 Iowa, 573; 20 Am. & Eng. Ency. of Law, 799. And, when controversies of which the civil courts have jurisdiction arise in such bodies, the courts will inquire as to the purpose for which they were instituted and the rule by which they are governed, and, so far as practicable, they

will be given effect: *Rottmann v. Bartling*, 22 Neb. 375; *Attorney General v. Pearson*, 3 Mer. 409; *Harrison v. Hoyle*, 24 Ohio St. 254. ⁶⁵ It was said in *Mt. Zion Church v. Whitmore*, 83 Iowa, 147, that, "upon authority so general as to be beyond question, it is held that property given or set apart to a church or religious association for its use in the enjoyment and promulgation of its adopted faith and teachings is by said church or association held in trust for that purpose, and any members of the church or association less than the whole may not divert it therefrom." This leads us to inquire whether the property in question is held in trust. On the day on which the articles of incorporation of the defendant church were adopted and its organization perfected, the lot on which the church edifice was afterward erected was conveyed to the society by warranty deed, which recited the payment of a consideration, but did not contain any declaration of trust. Whether the property in controversy is to be regarded as held in trust does not wholly depend upon the terms of that instrument. In determining its character, we may properly examine the articles of incorporation of the defendant church, its declaration of faith and practice when the funds for the purchase of the lot and for the erection of the building thereon were obtained, and the purpose which the funds were provided to aid. The church record book shows that persons who desired to be organized into a Free Will Baptist Church met in Waterloo in January, 1867; a council previously authorized by the Waterloo Quarterly Meeting, having been chosen, was organized; church letters were read; the church covenant was read and adopted; and a resolution to organize a church to be known as the "Free Will Baptist Church," was adopted; and the church appears to have been organized. The church covenant bound the members to labor together for the building up of the church and the denomination, to contribute for the support of the ⁶⁶ ministry and for other church expenses, to be benevolent to the needy, especially to the poor of their own church, and to sustain the benevolent enterprises of their own denomination and church, such as missions, education, Sabbath schools, and moral reform. At a later date, application was made to the Waterloo Quarterly Meeting for admission to that body, and afterward to the Cedar Valley Quarterly Meeting, to which it appears to have been admitted. In April, 1868, steps were taken to erect a church building, money was subscribed for that purpose, and the building was constructed. All that was done in the organization of the church and in procuring the property in question was in the name of the Free

Will Baptist Society, and at all times until January, 1894, it appears to have acted with and as a part of the Free Baptist denomination.

We have no doubt that the property was obtained for the use and benefit of that denomination. It is said, however, that there is no practical difference between that and the Baptist denomination. They are similar in many respects, especially in matters of organization and government, and both recognize the Bible as the only infallible rule of faith and practice. But there are important differences of belief which have thus far prevented a union of the two denominations, and recent agitations for a union have shown that they will continue separate for an indefinite period of time. The evidence before us shows that the faith of the Baptist denomination is Calvinistic, and it is briefly stated as follows: "The belief in original sin or total depravity; predestination; particular redemption; effectual calling and perseverance of the saints." The Free Baptist faith is based upon the doctrines of Arminius, and is stated to be: "1. Conditional election and reprobation, in opposition to absolute predestination; 2. Universal redemption, ⁶⁷ or that the atonement was made by Christ for all mankind, though none but believers can be partakers of the benefit; 3. That man, in order to exercise true faith, must be regenerated and renewed by the operation of the Holy Spirit, which is the gift of God; 4. That the grace which confers this is not irresistible; 5. That men may relapse from a state of grace, and die in their sins." Differences not disclosed by these statements of faith also exist. It is not any part of our duty to decide whether the difference between the respective articles of faith, covenants, and practice of the two denominations is substantial. It may be true that changes in such matters are constantly going on, and that it is beyond human power to prevent them; that in those things which make for worldly prosperity, as popularity, wealth, and numbers, the defendant church would be greatly benefited by its union with the Baptist denomination as proposed; but considerations of that kind have nothing to do with the legal rights of the parties to this action, and cannot be given weight in determining the questions of which we have jurisdiction. It is enough for the purposes of this case that the two denominations are now separate and distinct; that the property in controversy was acquired by the defendant church for the special benefit of one of them; and that the plaintiffs, being members of that church and of that denomination, object to the proposed change and insist that it shall not be made.

According to the usages of the Free Baptist denomination, it is the duty of each of its churches to unite with some Quarterly Meeting that is composed of two or more churches of the denomination, and has a constitution for its government. The functions of the Quarterly Meeting appear to be chiefly advisory. It cannot deprive a church of its independent form of government, nor its right to discipline its own members, ⁶⁸ nor labor with individual members of the churches as such, but it has the right to labor with the church as a body, in case of unscriptural or disorderly walk, and may determine whether a church is worthy of its fellowship. Some importance is attached to a provision in the "Manual of Church Government" in regard to the business of the Quarterly Meeting which reads as follows: "When a church in good standing requests a dismission to unite with another Quarterly meeting, or with another evangelical denomination, a letter of dismission and recommendation is given." It is urged that this recognizes the right of a church to unite with another evangelical denomination, but it does not purport to authorize the majority of any church to transfer the property of the church, and appears to refer to the church as an ecclesiastical, rather than as a purely legal, body. We find nothing in the record before us to show that the Quarterly Meeting has any authority in matters of property, and nothing to show that the defendant church was so organized that a majority of its members may dispose of its property for the benefit of another denomination, either directly or indirectly, in the manner attempted in this case. The property was acquired, as stated, for the use and benefit of the Free Baptist denomination, without any condition, expressed or implied, that it might be transferred to another, and it cannot be so transferred against the objections of members of the church, however few in number.

We are aware that our conclusion is not in harmony with the decisions in some of the states, especially those of New York; but it is according to the doctrine heretofore announced by this court, and appears to us to be supported by the weight of authority, and to be founded on principles of equity. It must be understood that what we have said has special ⁶⁹ reference to the rights of the defendants to transfer the property in controversy to the Baptist denomination. Since the resolutions in question cannot be carried out without affecting prejudicially the interests of the plaintiff in that property, the defendants are enjoined from carrying them into effect. Nothing we have said is to be construed to affect any right the defendant church has to withdraw as a

church from the Free Baptist and unite with the Baptist denomination; but the withdrawal, if carried out, must be so effected as not to change or cloud the title to the property in controversy.

The decree of the district court is reversed.

MR. CHIEF JUSTICE GIVEN and Mr. Justice Rothrock, dissented, and held that under the "Manual of Church Government," quoted in the opinion, the church under discussion as a body, had a right to unite with any other branch or evangelical denomination, and to take its property with it. Chief Justice Given said: "I do not question the doctrine that, when a church property is held exclusively for the promulgation of the faith and teachings of a particular denomination, it cannot be diverted to any other use by any number of the members less than the whole. To permit such a diversion would be a breach of the trust under which the property is held. Such is not this case. The opinion recognizes the right of this body to unite with the Baptist denomination, or, at least, declines to say that it may not. That is just what it was proceeding to do, and in the way provided, when this suit was commenced, and that is what the district court held it might do. The opinion does not prevent this church from consummating the union, but holds that it must be in such way as not to change or cloud the title to its property. If this property was held exclusively for the promulgation of the faith and teaching of the Free Baptist denomination, this would be correct, but it was not acquired, nor is it held, for that exclusive purpose. It was acquired by this body and is owned and held by it for the promulgation of the faith and teachings of whatever evangelical denomination it may see fit to unite with. It is, therefore, no breach of the trust under which this property was acquired and is being held, to allow the owner to use it in promulgating the faith and teachings of any evangelical denomination with which it may see fit to unite. To say otherwise is to deny to the defendant church the right to hold and use its own for the purpose for which it was acquired and held. Whether such a union may be effected by a bare-majority need not be considered, as the record shows that, of a membership of about sixty, fifty-four are in favor of the body uniting with the Baptist denomination."

RELIGIOUS SOCIETIES—PROPERTY OF—EFFECT OF DIVISIONS.—The title to the church property of a divided congregation is in that part, though a minority, which adheres to the ecclesiastical laws, usages, and principles of the denomination under which the church was constituted: Schnorr's Appeal, 67 Pa. St. 138; 5 Am. Rep. 415; Rosh's Appeal, 69 Pa. St. 462; 8 Am. Rep. 275, and note; McKinney v. Griggs, 5 Bush., 401; 96 Am. Dec. 360. See *Russie v. Brazzell*, 128 Mo. 93; 49 Am. St. Rep. 542.

RELIGIOUS SOCIETIES, PROPERTY OF—DIVERSION IN USE OF.—An injunction will issue to restrain such diversions of the use of church property as constitute violations of the trust under which it is held: *Reformed Protestant etc. Church v. Mott*, 7 Paige, 77; 82 Am. Dec. 613; *Curd v. Wallace*, 7 Dana, 190; 32 Am. Dec. 85.

CALUMET PAPER COMPANY v. STOTTS INVESTMENT COMPANY.

[96 IOWA, 147.]

CORPORATIONS—JUDGMENT AGAINST—PRESUMPTION. If, after an abortive attempt to incorporate, a de facto corporation becomes indebted, and subsequently cures the defects in its organization, after which a creditor obtains judgment against it on such indebtedness, it must be presumed that he obtained judgment against the de jure corporation.

CORPORATIONS—SUCCESSION—STATUTE OF FRAUDS.—If, after curing defects in its organization, a de jure corporation takes all the property and assumes all the liabilities of the de facto organization, the transaction is not within the statute of frauds.

CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—LIABILITY.—If a person holds unpaid stock in an insolvent corporation as collateral security for a loan, it is not necessary to prove that he subscribed for the stock, in order to hold him liable for the subscription.

CORPORATIONS—POWER TO TAKE STOCK AS COLLATERAL SECURITY.—A corporation authorized to loan money on real, chattel, or personal security, to buy, sell, hold, and transfer notes and other securities, and evidences of indebtedness, to make contracts, acquire and transfer property, in like manner as private individuals, has power to accept stock in another corporation as collateral security for signing a note on which the corporation obtains money.

CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—LIABILITY.—A person sued for unpaid stock subscriptions in a corporation, who is a stockholder at the time that the action is commenced, cannot defend on the ground that the plaintiff became a creditor of the corporation after the defendant acquired such stock.

C. MacKenzie and F. B. Huckstep, for the appellant.

S. G. Van Auken and C. Bowen, for the appellee.

148 DEEMER, J. In the month of May, 1892, J. F. Olsen, J. H. Welch, and Louis Stutz attempted the organization of a corporation to be known as the "Olsen-Welch Printing Company." Articles of incorporation were executed and filed, but no notice was given, as required by law. Olsen and Welch furnished all the capital, fifteen hundred dollars, which they borrowed from a bank and invested in machinery. This defectively organized corporation purchased from plaintiff some paper, some time prior to November, 1892, and, failing to pay therefor, judgment was obtained against the Olsen-Welch Printing Company, which judgment is the foundation of this suit. In November, 1892, the Olsen-Welch corporation was reorganized, or new articles of incorporation were adopted and filed, and due notice given, as required by law, to cure the defects in the former organization. This new corporation issued stock to the amount of seven thousand five hundred dollars to Olsen, and seven thousand five hundred dollars to Welch, and thereafter and within a few days,

Olsen and Welch each assigned two thousand five hundred dollars of the stock so issued to them to the defendant, Stotts Investment Company, and to one Schuyler, a member of the Stotts Investment Company—four thousand five hundred dollars ¹⁴⁰ to the defendant, and five hundred dollars to Schuyler; and thereafter the business was carried on in the name of the Olsen-Welch Printing Company. There was no formal transfer of property or change in the character of the business from the time of the first attempt to organize the company in May, 1892. The reincorporation was either to cover defects in the original, or for the purpose of forming a perfect corporation, so as to issue stock to the defendant. On the eighteenth day of January, 1893, the plaintiff recovered its judgment against the Olsen-Welch Printing Company, a corporation, and execution having been issued thereon, and returned unsatisfied, it thereupon commenced this action to recover the amount of its judgment from defendant as a stockholder holding unpaid stock to an amount more than the amount of plaintiff's claim. Olsen and Welch paid nothing for the stock issued to them, except as they transferred to the corporation property which, as we have seen, was not worth to exceed fifteen hundred dollars. The defendant paid nothing for the stock issued to it. It holds this stock either as collateral security, or as a bonus or gift from the corporation, for having procured a loan to it after its reorganization. The defendant, in answer, after some specific denials, avers that it never subscribed for any stock in the Olsen-Welch Printing Company, that it never in fact purchased any stock in said corporation, and that no certificates of stock were issued to it with the knowledge or consent of any of its authorized agents. It further avers that it is a corporation, and that under its articles it had no authority to purchase stock in the printing company. It also avers that before the commencement of this suit, it transferred its stock to one F. S. Treat, and is no longer the holder thereof. It further avers that, on ¹⁵⁰ the sixth day of December, 1892, the printing company, being indebted to it in the sum of fifteen hundred dollars, stock of Olsen and Welch in the printing company, to the amount of four thousand five hundred dollars, was reissued to it for the purpose of giving defendant security for the amount due it. Defendant also avers that plaintiff's judgment is against the corporation organized in May, 1892, and that it holds no stock in this company, its stock being in the corporation organized in November.

1. Upon the filing of this answer the defendant moved to transfer the action to the equity side of the calendar. This motion was overruled, and exception taken, and this presents the

first question for determination. Plaintiff's action was properly commenced at law: *Bayliss v. Swift*, 40 Iowa, 648; *Tama Water Power Co. v. Hopkins*, 79 Iowa, 653. We see nothing in the answer or amendments thereto which presents an equitable defense. Every matter pleaded in answer can be tried and determined in a law action. Indeed, we see nothing in any of the averments of the answer of an equitable character. No mistake was alleged, and no reformation asked. The motion to transfer was properly overruled.

2. It is next insisted that the judgment is against the defective corporation, organized in May, and that defendant was not a stockholder in this corporation. It seems to us this objection is based on a misapprehension. While it is true that the goods were sold by plaintiff before the reorganization of the corporation, or the perfecting thereof, in November, yet the judgment is against the Olsen-Welch Printing Company as a corporation. The first attempt to form a corporation by Olsen and Welch was abortive. So far as shown, no stock was ¹⁵¹ issued on this first attempt. While articles of incorporation were adopted, and there may have been a de facto corporation, yet we think it sufficiently appears that the judgment is against the de jure corporation organized in November. Under the facts disclosed, this would certainly be the presumption, and this presumption is not overcome by anything in the record. Indeed, we think the facts shown indicate quite clearly that the judgment was against the de jure corporation. The evidence shows that the new organization took all the property belonging to the old, and assumed its liabilities, and agreed to pay its bills. This promise was an original one, made in consideration of receiving the property, and is not within the statute of frauds. There is no merit in this contention of the defendant.

3. It is said that the court erred in finding that defendant was a subscriber for stock in the printing company. It may be that, technically speaking, defendant did not subscribe for any stock in the corporation; but this is not necessary where stock is in fact issued, as it was in this case. Defendant admits that it held stock in the corporation which was not fully paid up, and says it held it as collateral security for a loan. This is all that is necessary to be shown to render it liable: *Hale v. Walker*, 31 Iowa, 344; 7 Am. Rep. 137. It is only when no stock is issued that it is necessary to show a subscription for stock: *Jackson v. Traer*, 64 Iowa, 469; 52 Am. Rep. 449; *Nulton v. Clayton*, 54 Iowa, 425; 37 Am. Rep. 213.

¹⁵² 4. Defendant is also a corporation, and it is insisted that it had no authority, under its articles of incorporation, to purchase or hold stock in any other corporation. The articles of incorporation of defendant contain this provision: "The business of this corporation shall be to loan money on real estate, chattel, or personal security; to buy, sell, and transfer notes, bonds, mortgages, and other securities and evidences of indebtedness; to execute trusts; to borrow money or receive deposits of the same; issuing therefor of its own obligations, certificates, or receipts, and to buy, hold, sell, and convey real estate, personal or chattel property, and to establish branch offices, and do business outside of the state. And to that end it shall have and possess powers following, namely: 1. To have perpetual succession; 2. To sue and be sued by its corporate name; 3. To render the interest of the stockholders transferable; 4. To exempt the private property of its members from liability for corporate debts; 5. To make contracts, acquire, and transfer property, possessing the same power in such respects as private individuals now enjoy; 6. To establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs, in accordance with the law, and to possess all of the rights, powers, and privileges necessary for, incident to, or connected with the transaction of the business for which the corporation is organized." We have had occasion heretofore to pass upon almost the identical question here presented, in the case of Iowa Lumber Co. v. Foster, 49 Iowa, 25, 31 Am. Rep. 140, and we there held that a corporation possessed of powers substantially the same as conferred by the provision above quoted, had ¹⁵³ the right to deal in, acquire, and possess shares of stock in a corporation. This case seems to rule the question here presented adversely to appellant. It is said, however, that defendant did not purchase the stock issued to it, that it took it either as collateral security for signing a note for the printing company or as a gift, and that neither of these transactions are purchases in a commercial sense. It may be that it could not accept the stock as a gift, so as to bind its stockholders to pay assessments levied upon it, but we think the evidence shows that it received the stock as collateral security for signing a note for the printing company on which some money was obtained for the use of this company. This is clearly a commercial transaction, and one which is authorized under defendant's articles of incorporation.

5. It is contended that defendant sold its stock to one Treat before the commencement of this action. There is some testi-

mony of a sale to Treat, and of an attempt to have the stock transferred to him on the books of the company, but no showing whatever as to when this occurred. If done after the commencement of this suit, it is entirely immaterial; and if done before, such fact was a defense which defendant must establish.

6. Lastly, it is insisted that defendant is not liable because it received its stock long after plaintiff became a creditor of the corporation. There is no merit in this contention. All that need be shown is, that defendant was a stockholder at the time of the institution of the action: Code, sec. 1082; Beach on Private Corporations, secs. 125, 126. See, also, *Spilman v. Mendenhall* (Minnesota, Jan. 12, 1894), 57 N. W. Rep. 468. We have referred to every proposition discussed by counsel, and reach the conclusion that the judgment is right, and it is affirmed.

CORPORATIONS—RIGHT OF ONE CORPORATION TO TAKE STOCK IN ANOTHER AS COLLATERAL SECURITY FOR A LOAN.—If a corporation is formed for the purpose of loaning funds of itself or its stockholders, and is not forbidden to accept corporate stock as security, it may doubtless loan on such security, and, if necessary to its enforcement, may acquire title to the stock. No one will seriously contend that a corporation, whatever its purpose, may not acquire stock as security for, or in payment of, a debt: Monographic note to *Denny Hotel v. Schram*, 86 Am. St. Rep. 140.

CORPORATIONS—STOCKHOLDER'S LIABILITY—STOCK HELD AS COLLATERAL SECURITY.—One does not become liable as a stockholder in a corporation by the issuing to him by the corporation of stock, when the entry in the stock-book and all other records of the corporation show that such stock was issued as collateral security. To make one answerable as a stockholder to creditors of a corporation, he must be a stockholder as between himself and the corporation: *Union Sav. Assn. v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776, and extended note. But it has been generally held that one to whom stock has been transferred upon the books of a corporation, and who appears thereon as a stockholder when the liability attaches, is liable as a stockholder, although the transfer was made as collateral security: Monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 865.

CORPORATIONS—DE FACTO AND DE JURE.—The rights and liabilities of corporations de facto and de jure and of their stockholders is discussed in the monographic note to *People v. Montecito Water Co.*, 83 Am. St. Rep. 181-186. See, also, *Georgia Southern etc. R. R. Co. v. Mercantile Trust etc. Co.*, 94 Ga. 806; 47 Am. St. Rep. 153 and note; *Jones v. Aspen Hardware Co.*, 21 Colo. 263; 52 Am. St. Rep. 220, and note.

COLLINS v. BANKERS' ACCIDENT INSURANCE COMPANY.

[96 IOWA, 216.]

INSURANCE—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.—Going out in a boat to fish on a dark night in water that is dangerous because of sunken trees or snags unknown to the fisherman is not a voluntary exposure to unnecessary danger within the meaning of that term in a policy of life insurance, and does not defeat the right to recover such insurance.

GAME LAWS—FISHING WITH "TROT LINE."—Under a statute prohibiting the placing across any body of water a trot line so as to prevent the "free passage of fish up, down, or through" such water, but allowing fish to be taken with hook and line, taking fish with a trot line is not absolutely prohibited. The prohibition is against placing such line in a way to obstruct the free passage of fish.

INSURANCE.—ASSESSMENTS TO MEET LIABILITIES on a policy of accident assessment insurance must be made on the basis of membership at the date of the death or accident.

INSURANCE — ACCIDENT—ASSESSMENT.—New members of an accident assessment insurance association are not assessable for losses which occur before they become members, and assessments can be made only on the members liable to pay when the loss occurs.

Guernsey & Bailey, for the appellants.

Stiger & Struble, for the appellee.

217 GRANGER, J. A ground of defense is that the death of Drahos resulted from a voluntary exposure to unnecessary danger. Drahos was one of a fishing party camping on the Iowa river. The party had lines set out with hooks, and Drahos, with one Crossman, took a boat and went out to inspect them. It was in the night, and dark, and as they were returning the boat struck a limb or tree, in the water, and upset, and Drahos was drowned. A by-law of the defendant company provides that it shall not be liable for injuries or death resulting from voluntary exposure to unnecessary danger, because of which, and the particulars as to the death of Drahos, defendant urges that the judgment should be reversed. The party reached the river about 6 o'clock in the afternoon, and before it was dark, and put out their lines. It seems that in the water there were snags and trees, or at least one tree. The limb that upset the boat was "almost in the water; could hardly be seen." The snags seem to have been under the water. From the evidence, we understand that there was nothing observable, by looking at the water, to show it dangerous to go in a boat. It does not appear that Drahos knew of the snags, even if he knew of the tree that was partly in sight. The provision of the certificate containing the clause referred to exempts the company from liability for injuries resulting from duelling, fighting, wrestling, lifting, overexertion, or riding or driving races, or volun-

tary exposure to unnecessary danger. Fishing, as a pastime or business, is not included, in terms, and it could not well be said but ²¹⁸ that he had a right to go on the water in a boat to fish; that is, such fishing could not be regarded, in itself, as "unnecessary danger." Nor do we believe that the contract contemplates that going in a boat to fish, in a dark night, is such danger, in the absence of other facts. If it be conceded that the place where Drahos was drowned was dangerous, there is not enough to defeat a recovery. Before he could voluntarily expose himself to danger he must know of the danger, and it does not appear that he had such knowledge. The mere presence of a tree did not make it dangerous to go on the water. It does not appear that he knew, when on the water, that he was near the tree, or in danger because of it. Other elements of danger were concealed, or, at least, so much so that we cannot assume that, from observation, while there, he knew of them. It seems to us that the evidence fails to show a voluntary exposure to danger. The case is very unlike *Shaffer v. Travelers' Ins. Co.* (Ill. Sup., Oct. 31, 1889), 22 N. E. Rep. 589, and *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; 12 Am. St. Rep. 270. In those cases, and others cited, the facts giving rise to the danger were known, and the party was aware of the risks he was taking.

2. The party with which Drahos was had suspended a line over the river from bank to bank, and had hooks attached thereto, to make what is known as a "trot-line." Drahos and Crossman, when the accident happened, had been to inspect this line and other hooks that had been set out, and were on their way to the shore, and near it, when upset. The following is a section of chapter 34 of the acts of the twenty-third general assembly:

"Sec. 6. No person shall place, erect, or cause to be placed or erected, in or across any of the rivers, creeks, lakes, or ponds, or any outlets or inlets thereto, any trot-line, seine, net, weir, trap, dam, or other obstruction in such a manner as to hinder or ²¹⁹ obstruct the free passage of fish up, down, or through such water-course for the purpose of taking or catching fish, unless the same be done under the supervision of the fish commissioner, except minnows, as provided in section 2 of this act."

The by-laws of the company also provide that it shall not be liable for death resulting while, or in consequence of, violating the law. The fishing with a trot-line is urged as a defense to a recovery. The law is not against fishing with such a line. It is only against placing such a line in a way to obstruct the free passage of fish. The manner of catching fish

is with hook and line. Section 2 of the act defines how fish may be caught. It says: "It shall be unlawful for any person to take from any of the waters of the state any fish in any manner except by hook and line, except," etc. Section 6 is as to obstructing the passage of fish, and there is nothing to show that the trot-line was set in such a way as to obstruct such passage. If from the section we strike the words, "in such manner as to hinder or obstruct the free passage of fish, up, down, or through such watercourse," the section, as to a trot-line, would read as follows: "No person shall place, erect, or cause to be placed or erected, in or across any of the rivers, creeks, lakes, or ponds, any trot-line . . . for the purpose of taking or catching fish," etc. The language so used would be absolutely prohibitive of taking or catching fish with a trot-line, and that is the effect claimed for the section. The omitted words are for some purpose, and they so modify the other language as to make the prohibition apply to the use of the trot-line in a particular manner. It is to be borne in mind that the statute is a penal one, and the strictness of construction applicable to such statutes must obtain.

3. The money for the payment of the certificate, by the laws of the company, is to be raised by an assessment on its members, and it is provided that the ²²⁰ amount paid shall be dependent on the amount collected from an assessment made to meet the claim. The death occurred at a time when the membership was comparatively low, appellant fixing the number at two hundred and fifty. The number at the present time, or at the time of entering judgment, is much larger. It is urged by appellant that the assessment should be only on the membership at the time of the death. The court gave judgment on the basis of an assessment against all the members. We think that was error. The death of Drahos fixed the obligation of the company on the certificate. If it had then paid, the amount would have been measured by the assessment on the basis of membership at that time. The delay to determine the obligation of the company for the payment of any amount would not change its obligation, so as to permit an assessment for a greater amount. Nothing in the articles or laws of the corporation justifies the conclusion contended for by appellee. The following language in *Planters' Ins. Co. v. Comfort*, 50 Miss. 662, is directed to the personal liability of members of such a company for payment, and it also bears on the question we determine, of the amount to be raised by assessment to pay the loss. The language is as follows: "The person who effects insurance to-day is not liable for a loss that occurred

yesterday. Responsibility to contribute to a loss begins when the insurance has been effected, and terminates when the policy expires." In this case, it is not pretended that the assessment upon a particular member can exceed a certain amount, and hence the amount to be recovered is limited by the number liable to assessment at the date of loss. The amount, as thus fixed, must be raised by assessment. In *Newman v. Covenant etc. Assn.*, 76 Iowa, 56, 14 Am. St. Rep. 196, this language is used: "It is well understood that the membership of these assessment associations is ²²¹ constantly changing, that new members are not assessable for losses which occur before they become members, and the assessments can be made only on the members liable to pay when the loss occurs." Appellee presents the query: "Who are the two hundred and fifty members at the date of the death?" And it is said that the company has not disclosed the facts. It does not seem to us that such a disclosure is necessary in this case. Only the questions of liability, and the amount, are involved here. The company must have the means of knowledge so as to correctly make the assessment on the basis of the membership at the time of the death, and the judgment ordering an assessment should be carried out so as to raise the amount. We think that the judgment should be so modified as to make the assessment on the basis of the membership at the date of the death, and the cause is remanded for that purpose.

Modified and affirmed.

Kinne, J., took no part.

INSURANCE — LIFE.—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER means intentional exposure to such danger: *De Loy v. Travelers' Ins. Co.*, 171 Pa. St. 1; 50 Am. St. Rep. 787, and note. See monographic note to *Paul v. Traveler's Ins. Co.*, 8 Am. St. Rep. 765. It is "voluntary exposure to unnecessary danger, hazard, or perilous adventure" for a person with two packages in his hands or arms to attempt, by choice, on a dark and stormy night, to walk over a trestle which he knows to be dangerous, other ways of travel being open to him; and this is so although it was his usual route to his home, and many others traveled that way: *Traveler's Ins. Co. v. Jones*, 80 Ga. 541; 12 Am. St. Rep. 270, and extended note.

INSURANCE — MUTUAL — ASSESSMENTS.—In all cases, the burden of proof is on the association to establish a forfeiture by evidence that an assessment was made in the mode pointed out by the charter: Monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 784. There can be no forfeiture for a refusal to pay an excessive or invalid assessment. And while a forfeiture of membership in a benefit society resulting from nonpayment of an assessment may be waived by accepting overdue assessments, such a waiver is not raised by making an assessment upon a member for a death loss after default in the payment of annual dues, if such loss occurred prior to the default in the payment of dues: Monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 575, 576. New mem-

bers are not assessable for losses which occur before they become members: *Newman v. Covenant Mutual Ins. Assn.*, 76 Iowa, 56; 14 Am. St. Rep. 196.

GAME LAWS.—The inclination of the judiciary is beyond question to sustain, if possible, all laws, whether state or national, for the preservation of game and fish: Monographic note to *Ex parte Maier*, 42 Am. St. Rep. 138, on game laws.

STATE v. YOUNG.

[96 IOWA, 262.]

HOUSE OF ILL-FAME—KEEPER OF.—A man who allows other men to visit his house for the purpose of having illicit sexual intercourse with his wife, keeps a house of ill-fame, although no other female lives in or resorts to such house.

O. C. G. Phillips and L. McMillen, for the appellant.

M. Remley, attorney general, J. Carroll, county attorney, and D. Davis, for the state.

²⁶² **GIVEN, C. J.** The only ground for a reversal urged in argument, and the only one that fairly can be urged upon the record, is that the evidence fails to show that the house kept by the appellant was a house of ill-fame. The evidence is, that the defendant and Lucy Young, who is spoken of as his wife, lived together in the house mentioned, that the house was habitually resorted to by lewd and lascivious men, for the purpose of sexual intercourse with said Lucy ²⁶³ Young, who was a woman of bad repute, and that the general reputation of the house was that it was a house of ill-fame. There is no doubt but that the defendant kept the house, and knew that Lucy Young was using it for the purpose of prostitution. There is no evidence that any other female ever lived at or resorted to said house; hence it is that appellant claims that it was not a house of ill-fame. *State v. Lee*, 80 Iowa, 83, is quoted, wherein, in speaking of an instruction, the court said: "It informed the jury, also, that a single act of illicit intercourse in the house, or any number of acts with the proprietor alone, would not make the place a house of ill-fame, but that it must have been used for that purpose more than once by others than the proprietor." Appellant was the proprietor of the house. The acts of illicit intercourse were not with him, but between Lucy Young, with his knowledge and approval, and the men who resorted there for that purpose. The distinction between these cases is apparent. The house was a house of ill-fame. The defendant kept the same for the purpose of prostitution and lewdness, and his conviction is fully warranted by the evidence.

Affirmed.

HOUSE OF ILL-FAME—WHAT IS.—A house of ill-fame is one resorted to for the purpose of prostitution or lewdness. It is not necessary to warrant a conviction that the house had the reputation of being a house of ill-fame, if it is one in fact: *State v. Plant*, 67 Vt. 454; 48 Am. St. Rep. 821, and note. See, also, *State v. Caffey*, 104 N. O. 858; 17 Am. St. Rep. 704.

EMERSON v. LEONARD.

[96 IOWA, 311.]

EXEMPTIONS—HEAD OF FAMILY.—A childless widow living alone is not the head of a family so as to entitle her to hold certain personal property exempt from legal process.

Attachment upon certain personal property to recover rent. Plea of statutory exemption. Judgment for the plaintiff and the defendant appealed.

W. B. Collins, for the appellant.

Hughes & Roberts, for the appellee.

§11 ROBINSON, J. The question to be determined is whether the defendant was, at the time the property was seized, the head of a family, within the meaning of section 3072 of the code. That permits a debtor who "is a resident of this state, and is the head of a family," to hold exempt from execution certain property, and it is admitted that, if the defendant was the §12 head of a family, the property seized was exempt from attachment, and the judgment of the superior court was erroneous. The defendant was married in the year 1873, and has resided in the city of Keokuk continuously since that time, excepting a short time about the year 1878. Her husband died in January, 1883. He had been an invalid several years, unable to work much, and, the last year of his life, was not able to leave his home. He and his wife kept house and she took care of the family, and provided for it after his death. She has had children, but they died during the lifetime of her husband. The father of her husband was living with them at the time of his son's death, and for about a year thereafter, but did not pay for his board, nor furnish supplies for the house. An aunt of the defendant lived with her prior to her marriage, and also while her husband was living, and until a year and a half before the commencement of this action, sometimes being absent for a year. When the aunt was not absent she worked about the house, and was paid for her services, but did not pay anything for board, nor contribute to the household expenses. The defendant always kept a servant

until June, 1894, but since that time she has lived alone. She has supported herself, and others, when they were dependent upon her, by dressmaking. There cannot be a head of a family when there is no family. It is not material that there was once a family, if it has ceased to exist. The exemption is to the resident of this state who is—not to one who has been, but is not—the head of a family. The statute refers to a present, not to a past, condition. It is true that section 1989 of the code provides that a widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as a homestead at the time of the death of the husband or wife. But that provision has no application to exemption of personal property: *Linton v. Crosby*, 56 Iowa, 387, 41 Am. Rep. 107. The word “family,” in section 3072 of the code, is used in the ordinary sense, and necessarily includes more than one person. A family is defined to be “the collective body of persons who live in one house, and under one head or manager”: Webster’s International Dictionary. This definition was approved in *Tyson v. Reynolds*, 52 Iowa, 431, as applied to the word “family” in the section under consideration. In *Linton v. Crosby*, 56 Iowa, 387, 41 Am. Rep. 107, it was decided that the husband, who had lived apart from his wife for several years, and had not contributed to her support, there being no children, was not the head of a family. It was said to be the policy and intent of the statute “to exempt certain property because the support of a family, great or small, is cast upon the head thereof. Such family must have an actual existence as distinguished from one that exists theoretically only.” It may be that after the death of her husband the defendant became for the time the head of a family: *Tyson v. Reynolds*, 52 Iowa, 431. But, if that be true, it is clear that since the 1st of June, 1894—nearly six months before this action was commenced—she has not had a household, and has not been the head of a family. During that time she had no family to support, and was not within the letter or policy of the statute, and was not entitled to hold the property in question as exempt. The judgment of the superior court was required by the law, and is affirmed.

EXECUTION—HEAD OF FAMILY—WHO MAY CLAIM EXEMPTION AS.—If the wife and children continue to reside together in the house of her deceased husband, and constitute a family, she is entitled to exemptions offered by law to her as the head of a family. The wife, a childless widow, is embraced within the meaning of the words “family of the deceased,” and there is no ground for holding that she cannot occupy the position of head of a family: Monographic note to *Wade v. Jones*, 61 Am. Dec. 500. The Nevada

rule is in accord with this, but in Georgia such a person is not a head of a family within the meaning of the constitution: Extended note to *Rockwell v. Hubbell*, 45 Am. Dec. 254. See *Collier v. Lattimer*, 8 Baxt. 420; 85 Am. Rep. 711.

MEYER v. FIDELITY AND CASUALTY COMPANY.

[96 IOWA, 378.]

INSURANCE—ACCIDENT—CONSTRUCTION OF POLICY.—Evidence that the insured staggered before he received a fall resulting in an injury is not conclusive that he had fits or vertigo," excepted by the policy, if he had been in good health previous to the fall, and expert evidence shows that the staggering might have been produced by other causes..

INSURANCE—ACCIDENT—CONSTRUCTION OF POLICY.—The words "disease" and "bodily infirmity," as used in an accident insurance policy excepting liability for injury caused thereby, mean, practically, the same thing; and refer to some ailment or disorder of a somewhat established and settled character, some physical disturbance to which the insured is subject, and of which an attack causing him an injury is, in some measure, a recurrence; and they have no reference to some temporary disorder which is new and unusual, and arises from some sudden and unexpected derangement of the system, though it produces or causes unconsciousness.

INSURANCE—ACCIDENT—VIOLENT, EXTERNAL, AND ACCIDENTAL MEANS.—If a temporary and unexpected physical disorder causes the insured to fall and injure himself, the injury is received through violent, external, and accidental means, and the insurance company is liable therefor.

T. A. Murphy and Davison & Lane, for the appellant.

Cook & Dodge and J. Lischer, for the appellee.

379 DEEMER, J. On the twenty-fourth day of December, 1891, the defendant issued a policy of accident insurance, for the sum of five thousand dollars, to one Herman H. Meyer, insuring him against accidental injury occurring within one year from that date, and agreeing to pay his wife, the plaintiff herein, in the event of the death of the assured through external, violent, and accidental means, the amount of the policy. The policy also provided that the insurance should not cover "injuries, fatal or otherwise, . . . resulting directly or indirectly from intoxicants, anaesthetics, narcotics, sunstroke, freezing, vertigo, sleep-walking, fits, hernia, or any disease or bodily infirmity." The insured was a designer of machinery, and at the time of his death was the superintendent of the Davenport Foundry & Machine Company. Prior to his death, he was a man of good health, temperate in his habits, and industrious in his work. On the 380 twenty-first day of October, 1892, he left his home in apparent good health and spirits, to go to the city of Quincy, in the state of

Illinois. Arriving at Quincy at 10 or 11 o'clock in the evening of that day, he went to the home of a brother who resided in that city, and passed the night with him. About 8 o'clock next morning, he left his brother's house, and went down into the city to a bank where his brother was engaged in business. Here he remained for about twenty minutes, when he left the bank, in quest of a certain tobacco factory. He was next seen about a block from the bank, by a lady who, with a companion, with whom she was busily engaged in conversation, was coming up the street toward the place where the assured was standing, or, more properly speaking, staggering, as a witness puts it. The attention of this lady was directed to Meyer by his conduct. She says that, when she first observed him, he was standing close to an electric light pole, with his right arm raised and extended toward and about the pole, as if to gain a hold upon it; that he seemed to be making a continual effort to embrace or grasp the pole. His left hand was raised to about the height of his shoulder, as if to raise it to his head. During this time the assured's body had a wavering or staggering motion. The witness did not keep her eyes upon Meyer, but walked some distance after she discovered him, and turned to go into a store which was nearly in front of where he was standing. Just as she turned to enter the store, she heard a thud or sound from behind, which again arrested her attention, and, upon looking around she discovered Meyer lying upon his back, or nearly so, on the brick pavement, almost immediately in front of where he stood when she first saw him. Another witness saw Meyer just as he was falling, and saw his head strike the pavement. A third saw him, just as he was stepping off the edge of the flagging, ²⁸¹ stagger and fall. This witness does not remember of having noticed him before. He says he does not know and could not tell whether he tripped on the edge of the flagging, or simply staggered and fell. The fall resulted in the fracture of Meyer's skull, from the effects of which he died in a few hours. The defendant refusing to pay the amount of the policy, plaintiff thereupon commenced this action, alleging the issuance of the policy, the death of the assured, and a compliance with all the conditions precedent on her part to a right of recovery. The defendant, in answer, admitted the issuance of the policy, and the death of Meyer resulting from injuries received through a fall, but denies that Meyer died from the direct effects of his injuries received in the fall. It is also pleaded that, at the time of the injury to Meyer, he had an attack of vertigo, fits, or heart trouble, and that the injury and death of

Meyer were due to an attack of vertigo, fits, heart trouble, or some bodily infirmity. When the case came on for trial, the defendant, in open court, expressly admitted all the allegations of the petition, except any liability to plaintiff, and denied liability because of the facts stated in the answer, showing that the death of Meyer was the result of an attack of vertigo, fits, heart trouble, or some bodily infirmity, and claimed and was awarded the opening and closing.

Three special interrogatories were submitted to the jury, to which they made answers as indicated. These interrogatories and answers were as follows: "1. Was the falling of H. H. Meyer on the brick pavement at Quincy, Illinois, on October 22, 1892, at the time he was injured, caused directly or indirectly from fits, vertigo, or any disease or bodily infirmity? A. No. 2. If the falling of H. H. Meyer on the brick pavement was caused directly or indirectly by reason of any disorder in his physical condition at ³⁸² that time, did such condition result from some temporary cause and not from previous disease or bodily infirmity? A. Yes. 3. If you answer the last interrogatory 'Yes,' was the disorder something other than fits or vertigo? A. Yes." The jury also returned a general verdict for the plaintiff.

The abstract contains several assignments of error, but the argument of appellant's counsel relates to but two subjects: 1. It is insisted that the verdict is not sustained by sufficient evidence; and 2. That the court erred in its instructions to the jury. Some other matters are referred to, which we may incidentally mention during the course of the opinion.

As the defendant assumed the burden of showing that the injuries which caused the death of Meyer resulted directly or indirectly from an attack of vertigo, fits, heart trouble, or some bodily infirmity, it is manifest that the verdict is right unless the evidence adduced to sustain this issue is so overwhelming as to produce the conviction that the verdict was the result of passion or prejudice, or unless, under the undisputed evidence in the case, no two minds of ordinary intelligence could reasonably and fairly come to any other rational conclusion than that the injury and death of Meyer were due to or caused by an attack, as claimed by the defendant. We have already recited enough of the facts to show that the assured was a man of good health, and free from disease, so far as could be discovered by members of his family or by his family physician, up until within a few minutes of the accident. It is true that when first observed, just prior to his fall, he was staggering or wavering, as one

might do who had an attack of vertigo, or who was subject to fits; but the experts whose testimony was adduced upon trial say that his conduct might be due to a fainting spell, caused by some injury or shock to his system, or to an attack of indigestion,³⁸³ or to a number of other causes. There is no more reason for saying that the accident was due to an attack of vertigo or fits than that it was caused by some slight injury just previously received, or to some other local cause, which resulted in a temporary faint, causing the fall. It will not do to say that the evidence shows beyond controversy that the injury and death were due to an attack of vertigo, fits, heart trouble, or some other bodily infirmity, unless we are prepared to hold that any slight or temporary disorder is a "bodily infirmity," within the meaning of the policy. And this brings us to the second question in the case.

2. The court instructed the jury, in substance, that, if the death of Meyer was due to an attack of vertigo or fits, then the plaintiff could not recover, nor did it matter whether the attack was sudden, unexpected, or temporary, or the manifestation of a permanent disorder; but, with reference to "disease" and "bodily infirmity," the court gave this instruction: "6. If Herman H. Meyer's fall was caused by disease, plaintiff cannot recover; but the question naturally arises, What is a 'disease' within the meaning of the contract in suit? The ordinary definition of the word is: 'Any derangement of the functions or alteration of the structure of the animal organs.' This, as you will see, would include the slightest and most temporary ailment. But this is not its meaning as used in this policy. The policy or contract in suit singles out some particular diseases, as vertigo or fits, and exempts the company from liability for accidents caused hereby; and in such cases, as I have told you in the last instruction, the company will be relieved from liability, even if the attack was sudden, unusual, and of a transient nature; but if you don't find either of these two specially mentioned³⁸⁴ maladies to have been the cause of the accident, but are required to see whether such cause existed under the general head of 'disease,' then you must accept this word as meaning some ailment or disorder of somewhat established or settled character, some physical disturbance to which Meyer was subject, and of which the attack that caused his fall was in some measure a recurrence. A mere temporary disorder, that was new or unusual with him, arising from some sudden and unexpected derangement of the system, though it produced or caused unconsciousness, would not be a 'disease' within the meaning of this contract, and would not exempt the

defendant company from liability in this action. Here, again, you are limited to circumstantial evidence upon which you are to base your finding." In another instruction the court said: "Construing the contract or policies sued upon, I may say that under its provisions, if said Meyer's fall was caused by vertigo or fits, or by reason of disease or bodily infirmity, the defendant cannot be held liable in this action. And, under the facts in this case, the words 'disease' and 'bodily infirmity' must be considered as having the same meaning."

These instructions are vigorously assailed. It is contended on behalf of the company that it is exempt from liability on account of injury, through any defect, imperfection, weakness, or unhealthy state of the body, although the same was not a developed or recognized disease; and that, while the words "any disease" would embrace and include any "bodily infirmity," yet "every bodily infirmity" would not necessarily be a disease. The instruction with reference to an attack of vertigo or fits is not complained of, and the controlling point on this branch of the case turns upon the definition given by the court of the terms "disease" and "bodily infirmity." It is said the court erred in ~~see~~ holding them to mean, in effect, the same thing, and that, in any event, the sixth paragraph of the charge is erroneous and misleading. As used in this policy, we think the words "disease" and "infirmity" mean practically the same thing. When speaking of an "infirmity," we generally mean the state or quality of being infirm physically or otherwise—debility or weakness; and by the use of the word "disease" we desire to convey the impression of a morbid condition, resulting from some functional disturbance or failure of physical function which tends to undermine the constitution. We do not, as a general rule, apply either term to a slight and temporary disorder, or to the imperfect working of some function, which is over in a short period of time, and which, when recovered from, leaves the body in its normal condition. In using either of the words, we do not, as a rule, refer to a slight and mere temporary disturbance or enfeeblement. If this is true of our ordinary speaking and writing, it is certainly clear that the words should be given no broader meaning when we find them used by an insurance company in a clause of its policy which it relies upon to defeat a recovery thereon. The language used is made up of words framed by the company or its legal advisers in an attempt to limit as narrowly as possible the scope of the insurance; and it is a universal, as well as a fair, rule, adopted by the courts everywhere, to construe the terms of the policy

most strongly against the assurer, and to resolve every doubt or ambiguity in favor of the assured and against the assurer. The word "disease," when used in an ordinary life policy, has been given the meaning we think should be applied to it in this case in the following, among other, cases: *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72; *Northwestern etc. Ins. Co. v. Heilmann*, 93 Ind. 24; *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. L. 587; 60 Am. Rep. 661; *Pudritzky v. Supreme Lodge*, 76 Mich. 428; ³⁸⁶ *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894; *Mutual Benefit etc. Ins. Co. v. Daviess*, 87 Ky. 541. See, also, *Sieverts v. National etc. Assn.*, 95 Iowa, 710. The instruction given by the court below is in harmony with our views, and clearly makes the distinction which we think ought to be preserved between mere temporary disorders and those functional disturbances which are ordinarily denominated "diseases" or "bodily infirmities." Our position has strong support in the case of *Manufacturers' etc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945, from the United States circuit court of appeals for the sixth circuit; Taft, J., writing the opinion. This authority is clearly in point, and was evidently followed by the learned district judge in preparing his instructions in this case.

The phraseology of the sixth instruction is also complained of. It is said it required the defendants to prove that the attack was a recurrence of some previous attack, indicating a disorder, before it could be said to be disease. We do not so understand the instruction. The whole sentence a part of which is complained of reads: "Then you must accept this word as meaning some ailment or disorder of a somewhat established or settled character, some physical disturbance to which Meyer was subject, and of which the attack that caused his fall was in some manner a recurrence. A mere temporary disorder, that was new or unusual with him, arising from sudden and unexpected derangement of the system, though it produced or caused unconsciousness, would not be a 'disease,' within the meaning of this contract, and would not exempt the defendant company from liability in this action." The instruction is clear and unambiguous, and is not fairly susceptible of the construction counsel would place upon it. It is also said that the court was in error in instructing with reference to ³⁸⁷ disease, for the reason that defendant did not plead "disease," but "bodily infirmity." The policy, however, used both terms, and reliance was placed upon the provision. The court was required to so instruct in order to fully present the issues.

It is also said in argument that the policy covers death from violent, external, and accidental means, and that the proximate cause of death in this case was not the fall, but some disorder with which the deceased was afflicted. It is quite clear, both on principle and authority, that if the disorder which caused the fall was temporary and unexpected, the injury was violent, external, and accidental, and the whole matter was properly left to the jury for them to determine whether the disorder was of a temporary character.

An exposition of what is proximate cause is not called for here. It is almost, if not quite, impossible to give a definition of the term "proximate cause" which shall at once be clear, accurate, and comprehensive. It is sufficient to say that the question here mooted has been decided adversely to appellant by a long line of respectable authorities, among which are *Manufacturers' etc. Co. v. Dorgan*, 58 Fed. Rep. 945, and *Max v. Assurance Co.*, 4 L. T., N. S., 833; *Winspear v. Accident Ins. Co.*, 6 Q. B. Div. 42; *Lawrence v. Accidental Ins. Co.*, 7 Q. B. Div. 216; *Trew v. Railway Passenger Assur. Co.*, 6 Hurl. & N. 838; *Reynolds v. Accident Ins. Co.*, 22 L. T., N. S., 820; *Accident Ins. Co. v. Crandal*, 120 U. S. 527. It seems to be a well-settled rule in insurance law to attribute an injury or loss to its proximate cause only; and, if this be true, the disorder, whatever it may have been, was but a condition, the fall being the sole and proximate cause of the injury. Lord Bacon's first maxim that "it were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the ⁸⁸⁸ immediate cause, and judgeth of acts by that, without looking to any farther degree," seems to apply to this character of cases.

The instructions of the court below were correct; the verdict has support in the evidence; and the judgment is affirmed.

INSURANCE—DEATH THROUGH EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS—WHAT IS.—Where the terms of an accident policy require proof that death was caused "by bodily injuries effected through external, violent, and accidental means," recovery may be had, although death was produced by a ruptured blood vessel about the heart, caused either by fright or resulting from extraordinary mental or physical exertion put forth by the deceased to save himself from injury when in imminent peril brought about by accident: *McGlinchey v. Fidelity etc. Co.*, 80 Me. 251; 6 Am. St. Rep. 190. See, also, *American Accident Co. v. Reigart*, 94 Ky. 547; 42 Am. St. Rep. 374, and note. See extended note to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 763-766.

INSURANCE—DEATH FROM DISEASE—WHAT IS.—An accident insurance policy provided that it should not extend "to any death or disability which may have been caused wholly or in part by bodily infirmities or disease." In an action on the policy, it appear-

ed that the insured died from a malignant pustule, an acute infectious malady caused by contact with putrid or diseased animal matter; it was held that the death was from disease within the meaning of the policy: *Bacon v. United States etc. Assn.*, 128 N. Y. 304; 20 Am. St. Rep. 748; and see the dissenting opinion thereto. Where one died from drowning in the waters of a brook while in an epileptic fit, the death was held to be insured against under a similar policy: *Extended note to Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 766.

STATE v. DES MOINES.

[96 IOWA, 521.]

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—SPECIAL LEGISLATION.—If a statute providing for the annexation of cities, though general in its language, can in no event become operative upon but a single city by reason of conditions specified therein, it is special legislation, and void, under a constitution prohibiting the enactment of local or special laws for the incorporation of cities.

MUNICIPAL CORPORATIONS—RIGHT OF PRIVATE PERSON TO TEST EXISTENCE OF—ESTOPPEL BY LACHES.—If a void statute annexes territory to a city, and by its terms disorganizes and abolishes municipal corporations lying within the annexed territory, and such city then exercises municipal jurisdiction over all of such territory for more than four years, levying and collecting taxes, making contracts and extensive improvements, and incurring liabilities, and is recognized as such enlarged corporation by subsequent sessions of the legislature, a nonresident taxpayer with but a trifling interest, who does not claim that he is injured by such enlarged corporation, nor that any benefit to anyone will be derived from his action, is not entitled, as a mere naked legal right, to a judgment availing and ousting the present corporate existence and authority of such city, although a statute allows such an action to be brought at any time within five years. In such case, the plaintiff is estopped by his laches from disturbing the city's equitable claim to jurisdiction over the annexed territory.

Quo warranto to test the right of the defendant city to exercise corporate jurisdiction over certain territory added to it by legislative enactment.

Gatch, Connor & Weaver, for the appellant.

J. K. Macomber, A. P. Chamberlain, and H. Brennan for the appellee.

⁵²⁴ GRANGER, J. It is first said that the relator, A. G. West, has not sufficient interest to authorize him to invoke the action of the court in behalf of the state. Mr. West is not a citizen of Des Moines, as enlarged; but he is the owner of land within the added territory, but not in any of the corporations as they were before the annexation. The assessed valuation of his land is eighty dollars, and it is estimated that ⁵²⁵ he pays city taxes

thereon to the amount of one dollar and thirty-one cents. This is thought to be too trifling an interest to permit him to institute the action. The law provides that when the county attorney, on demand, refuses or neglects to commence such an action, any citizen of the state having an interest in the question may apply to the court in which the action is commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, he may prosecute the action to final judgment: Code, sec. 3348. This provision of the law was complied with, and leave granted by the district court. This action is conclusive upon us. The law does not define what the interest shall be, and, conceding that it must be a substantial one, it was a question for the district court. It was a question to be settled before the suit was commenced. The language of the law is that "upon obtaining such leave he may prosecute the action to final judgment." Certainly, the question of fact, as to the extent of the interest, is one confided to the court to which application is made.

2. The constitutional questions as to the validity of the law making the annexation are important. The parties, in argument, concede that the learned judge who tried the case below held the law to be unconstitutional, but denied the relief asked on the ground of laches or estoppel. Appellee, however, in this court, insists that such a holding was erroneous, and the questions are for consideration. Logically, the first question is, whether or not the act is general, or local and special, in its application. It will be seen that the act, in terms, is made to apply to all cities which had, by the state census of 1885, a population of thirty thousand. If the act had specified the city of Des Moines as the one whose boundaries were to be extended, there would be no question that the law is local in its application. The law, as enacted, just as explicitly confines its application to the city of Des Moines as if the city had, in words, been named, for it was the only city in the state having the requisite population. Appellee contends that because of the language of the act, by which it is to apply to "all cities in this state which had, by the state census of 1885, a population of thirty thousand or more," it is a law of general application. The constitutional language is, after stating certain exceptions, "All laws shall be general and of uniform operation throughout the state." It is not necessary to an observance of this provision that the law should operate uniformly on all the people of the state, nor, when the legislation pertains to cities, is it important that it should operate uniformly on all cities throughout the state. But if the law is

made to operate upon a particular condition as to persons or property, and is operative whenever and wherever the same conditions exist, affixing the same consequences, then it is a general law in its operation, even though it only operates on one of the conditions or classes specified. To illustrate, we may instance the laws regulating banking, insurance, agricultural societies, and the like. If the law is so framed that it does and can apply to but one bank, company, or society, in its operation, it is special legislation. General legislation looks not alone to the present, but to the future; and a law which at a given time operates as to only one bank, company, or society because there is but one such, but is so framed as to operate on the same conditions, when and where they arise in the state, is a general law, and of uniform operation: See *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *United States Exp. Co. v. Ellyson*, 28 Iowa, 370; *Von Phul v. Hammer*, 29 Iowa, 222; *Haskel v. Burlington*, 30 Iowa, 232. This rule is one of general recognition. ⁵²⁷ As applied to cities, if the act is such that it is operative, because of its terms, as to but a single city, it is local legislation: *McGregor v. Baylies*, 19 Iowa, 43; *Owen v. Sioux City*, 91 Iowa, 190. Counsel for the defendant city cite the above cases, with many others announcing the same rule, and on them base the claim that the act under consideration is of general application, even though there is but one city to which it can apply. It is true that in many of the cases cited, where the law has been held of general application, there was but one city of the class intended to come within the rule of the legislative act; but it is not true that in any of the cases a law, though general in terms, where it could in no event become operative on but a single city, has been held to be a general law. Had the act in question been made applicable to all cities of over thirty thousand inhabitants, without a qualification that, under known facts, would exclude its operation as to any other such city, the case would be different. But because a law thus arbitrarily extending city limits could not be made of general application, because of the absence of conditions to justify it, it was made to apply only to cities of that number of inhabitants at a particular date in the past, when there was but one such city to which it could apply, so as to avoid the possibility, even, of any other city coming within its provisions. The act is singularly specific in this respect, not even permitting any chances as to what might be the actual population of other cities, but making it dependent on the census return of 1885, known at the time the act was passed, which clearly proves that only the

city of Des Moines was intended as the subject of such legislation. In such a case, even though the language of the act is general, it is special legislation. In *State v. Hammer*, 42 N. J. L. 435, the court, in treating this ⁵²⁸ subject from a constitutional standpoint, said, as to the effect of such general language, where but two cities of the state could be affected by the law: "The result therefore, is that the act was intended to apply, and that it does and must ever apply, to these two cities alone; and the legal effect of the law, as now constituted, is the same as though it had, in express terms, declared that it was not to be operative through the state at large, but in the cities of Elizabeth and Newark only." The law was held to be local in its application, and unconstitutional. The conclusion is, unmistakably, that the act in question is local legislation.

3. With the question settled that the act is local legislation, we are next to determine whether or not it is of the class of legislation prohibited by the constitution. The question has received extensive consideration in argument by counsel on both sides. The constitution does not in all cases prohibit special or local legislation. It permits it in some cases. Section 30 of article 3 of the constitution reads as follows: "The general assembly shall not pass local or special laws in the following cases: For the incorporation of cities and towns. . . . In all cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." There are six of the enumerated cases. It has been thought, and it is appellant's contention here, that the prohibition of the section as to local or special legislation is absolute as to the "cases above enumerated," and as to other cases the prohibition is conditional, depending upon whether or not general laws can be made applicable. It is now urged for the first time, so far as we know, that there is no positive prohibition, but that, as to both cases or classes of laws, as designated in the section, ⁵²⁹ the prohibition is conditional. Appellee, by a transposition of the last sentence, and a grammatical application of the rules of language to it, gives the following as expressive of its meaning: "In all the cases above enumerated where a general law can be made applicable, and in all other cases where a general law can be made applicable, all laws shall be general and of a uniform operation throughout the state." This means, stripped of its verbiage, that all laws shall be general and of uniform operation throughout the state, where such a law can be made applicable. This renders meaningless more than half the words employed in

the section, and nearly half of those in the sentence we are construing. If the sentence could be made clearer by a transposition, ours would be this: "In all the cases above enumerated, all laws shall be general and of uniform operation throughout the state, and in all other cases where a general law can be made applicable." By this we preserve and give a meaning to all the language employed, and observe the legal requirements as to construction. The other is a manifest disregard of the rule. To us the section is not open to serious question in the respect suggested. The prohibition as to local and special legislation is absolute, as to the enumerated cases. While this precise question has not been considered, this section has been so applied in a number of cases: *Ex parte Pritz*, 9 Iowa, 30; *Von Phul v. Hammer*, 29 Iowa, 222; *McGregor v. Baylies*, 19 Iowa, 43; *Haskel v. Burlington*, 30 Iowa, 232; *State v. King*, 37 Iowa, 462; *Richman v. Supervisors*, 77 Iowa, 513; 14 Am. St. Rep. 308. If the act in question is local or special legislation, and is prohibited by the section of the constitution considered, it is not contended that the fact that it is an act merely extending the boundaries of the city will give it validity. That the constitutional prohibition extends to acts amending charters and acts creating ⁵³⁰ such corporations, see *Ex parte Pritz*, 9 Iowa, 30; *McGregor v. Baylies*, 19 Iowa, 43; *Von Phul v. Hammer*, 29 Iowa, 222. Our conclusion is, that the act providing for the annexation is against the express provisions of the constitution prohibiting the passing of local or special laws for the incorporation of cities, and is therefore void.

4. It is next to be determined whether or not, with the law giving rise to the annexation absolutely void, the legality of the present city organization can be sustained under the rule of estoppel or laches. On this branch of the case a large number of authorities have been cited, and the newness of the question, as well as the great interests involved, makes it one of great importance. The foundation for the application of the doctrine of estoppel is the consequence to result from a judgment denying to the city of Des Moines municipal authority over the territory annexed, after the lapse of four years, during which time such authority has been exercised, and the changed conditions involving extensive public and private interests. It will be remembered that the act of annexation resulted in the abandonment of eight municipal governments, which before the annexation were independent, and bringing them under the single government of the city of Des Moines. This involved a vacation of all offices in the

city and towns annexed, and the delivery of all public records and property to the officers chosen for the city so enlarged. For four years taxes have been levied, collected, and expended under the new conditions; public improvements have been made, including some miles of street curbing, paving, and sewerage, for which certificates and warrants have been issued, and contracts are now outstanding for such improvements. In brief, with the statement that for the four years the entire machinery of city government has been in operation, ⁵³¹ the situation may be better imagined than expressed. It is hardly possible to contemplate the situation to result from a judgment dissolving the present city organization, and leaving the territory formerly embraced within corporate lines as it would be left. Of all the cases to which we are cited, involving the validity of municipal organizations, where the consequences to result from a judgment of avoidance are considered, not one presents a case of such uncertainty, nor where there are the same grounds for serious apprehension, because of difficulties in adjusting rights in this case.

There are many cases where the doctrine of laches has been applied to sustain a municipal government where the organization, as attempted, was illegal. Much importance is attached by appellant to the fact that in this case the act serving as a basis for the annexation is absolutely void, and a distinction is drawn between proceedings where they are irregular merely, and where they are void. The case of *State v. Leatherman*, 38 Ark. 81, is perhaps as directly in point on the particular question as any we have noticed. It involved a consideration of the legality of the establishment of Arkansas City, in that state. In Arkansas, such corporations are established on the order of court, and it was found that the court making the order had no jurisdiction to make it, and as to that branch of the case the court said, "There was no jurisdiction, and the order was void." The court then proceeded to the consideration of the question we are now considering, and, after detailing some of the consequences to result from a judgment avoiding the corporation, it is said in the opinion, speaking of that city, with others, probably organized under similar orders, "To declare them all null, after long acquiescence on the part of the state, would open a very Pandora's box of litigation, and produce incalculable hardship and confusion." In the ⁵³² same connection the court further said, "This impels us to the broader fields of inquiry, whether this court, in view of justice, equity, and the security of titles, can find, in recognized principles of law, sufficient warrant for refusing its aid in opening the floodgates of unmitigable evil."

The question was, in that case, presented on a demurrer to the answer, the action being by information in the nature of quo warranto, as in this case. It may also be said that the information was presented by the attorney general in behalf of the public, and not on the relation of a private prosecutor, as in this case. The opinion is concluded in these words: "The case made by the answer shows an acquiescence for nearly nine years, and in recognition by the governor, county collector, and the whole of a population now over one thousand. If the answer be true, the corporation of Arkansas City should not now be held null and void." Barring that of time, the same facts are true in this case; the time here being, before the commencement of the suit, a little more than four years. In connection with the thought as to delay on the part of the public, it may be well to say that our law expressly authorizes such actions to be commenced by the county attorney, in the name of the state, and makes it his duty to do so when directed by the governor, the general assembly, or a court of record. The general assembly has twice convened since the annexation, in the city affected by the act, the seat of government being within its limits; and the validity of the corporation has never been, by it, nor by any public officer, questioned. These suggestions bear on the fact of a public recognition of the present corporation. The Arkansas case cites, and we refer to, *Jameson v. People*, 16 Ill. 257; 63 Am. Dec. 304. That case, also, was quo warranto, in behalf of the state, to oust the officers of the town of Oquaka, because of illegality in the organization of the town. The claimed illegality was an irregularity⁵³³ in the manner of voting on the question of incorporating. The validity of certain bonds issued by the town depended on the existence of the corporation. The question was presented by a demurrer to defendant's pleas, corresponding to our answer, in which it was made to appear that for more than four years the corporation had been recognized by the legislature in its acts; had exercised the powers and franchises conferred on such corporations by law; had levied and collected taxes, made contracts, and incurred liabilities, and passed and enforced ordinances. The supreme court declined to consider the matter of irregularity in voting and sustained the corporation alone on the grounds of the averments of the answer or pleas; and, while it attached much importance to the subsequent acts of the legislature in recognition of the corporation, it added, after detailing some consequences to result: "Municipal corporations are created for the public good—are demanded by the wants of the community; and the law, after long-

continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence. . . . It would seem incompatible with good faith, and against public policy, although irregularities may have intervened in the organization of the town, now to hold that it was not a body corporate. We do not think the law requires us to do so." We realize the dissimilarity of the case, in some respects, from the one under consideration; but at the same time, in its reasoning and conclusions, it sustains the principle that laches may overcome legal defects in such organizations. *People v. Maynard*, 15 Mich. 463, is quo warranto, and the case involved the validity of a county organization, which was held void, as we understand, by a majority of the court, on constitutional grounds. The court in that case says: "Inasmuch as the arrangement there indicated had been ⁵³⁴ acted upon for ten years before the recent legislation, and had been recognized as valid by all parties interested, it cannot now be disturbed. Even in private associations, the acts of parties interested may often estop them from relying on legal objections which might have availed them if not waived. But in public affairs, where the people have organized themselves, under color of law, into ordinary municipal bodies, and gone on, year after year, raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin, and no ex post facto inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such acquiescence, the corporate standing of the community can be no longer open to question." The case cites *Rumsey v. People*, 19 N. Y. 41, and *Lanning v. Carpenter*, 20 N. Y. 447. Mr. Cooley, in his work on *Constitutional Limitations*, fourth edition, page 312, says: "In proceedings where the question of whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appears to be acting under color of law, and recognized by the state as such. . . . And the rule, we apprehend, would be no different if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, and private parties could not enter any question of regularity. And the state itself may justly be precluded, on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition." This, it is true, is a direct proceeding by the

state. And, while the language used is applied in part to collateral proceedings, it seems also to include actions by the state directly. ⁵³⁵ The learned writer sustains this text by a reference to *People v. Maynard*, 15 Mich. 463; *Rumsey v. People*, 19 N. Y. 41; and *Lanning v. Carpenter*, 20 N. Y. 447. It will be seen that importance is given to the fact that the defective organization takes place under color of law. Nothing less can be said of the annexation in this case than that it was made under color of law. "Color of law," does not mean actual law. "Color," as a modifier, in legal parlance, means "appearance as distinguished from reality." Color of law means "mere semblance of legal right": *Kinney's Law Dictionary and Glossary*. In some of the cases, the defects as to organization have been spoken of as irregularities, because of which appellant thinks the cases not applicable, because this is a void proceeding. The term "irregularity" is oftener applied to forms or rules of procedure in practice than to a nonobservance of the law in other ways, but it has application to both. It is defined as a "violation or nonobservance of established rules and practices." The annexation in question was a legal right under the law, independent of the act held void. It was not a void thing, as if prohibited by law. The most that can be said is, that the proceeding for annexation was not the one prescribed, but it was a violation or nonobservance of that rule or law. It seems to us that the proceeding is no less an irregularity than in the cases cited.

Importance is attached to the fact that the statute fixes the time in which a suit may be brought in such a case at five years. Notwithstanding the analogy between the law by which a right of action is limited, and that of an estoppel, where time is an ingredient, it has never been held that the time in the two cases is the same. The former goes to the right to maintain or prosecute the action, and the latter to a right of recovery. The one is determined by arbitrary date, without a reference to consequences, ⁵³⁶ while the other is applied only to deny relief, when, because of neglect or wrong, a party has forfeited a right he might otherwise possess. The application of the rule of estoppel cannot be made to depend on a particular date. In one case a time much shorter than the period of limitation would be sufficient to invoke the rule, while in another it will be much longer. It is not to be denied but that there are very many cases where legislative acts have been adjudged unconstitutional, and hence void, where rights and interests acquired under and because of them have been defeated; and this is true where, between the en-

actment and the judgment, long time has intervened. In *United States v. Beebe*, 127 U. S. 338, the action was to set aside a patent for land obtained by fraud, and in the opinion it is said: "The principle that the United States are not bound by any statute of limitations, or barred by any laches of their officers, however gross, in a suit brought by them, as a sovereign government, to enforce a public right or to assert a public interest, is established beyond all controversy or doubt." Appellant cites the case, and also *United States v. Insley*, 130 U. S. 263, to the same effect. It is then said that in this case the state is seeking to assert a public interest, in that it is aimed at a "usurpation by a municipal corporation of powers not conferred by a valid law." If that is the purpose of the suit it will be realized; for we hold, in as explicit terms as we can command, that the act is inoperative to confer upon the defendant corporation any power or rights whatever. Had the act never been passed, and the same method for annexation been adopted, with the same conditions as to recognition, acquiescence, delays, and public and private interests involved, the same conclusion would result; and hence the act is without the least significance, nor have we given it a shadow of bearing, except in so far as it may have ⁵³⁷ served as a color of law inducing the proceeding for annexation. But, aside from this, the record in no way indicates a public interest to be subserved by a judgment avoiding the present corporate existence. Not one of the sixty thousand or more inhabitants of the city as now constituted makes a complaint, nor does it appear but that all are entirely satisfied with the change that has been made. The relator, but for whom the cause would not be in court, is not a resident of the city; but he is the owner of land of the assessed valuation of eighty dollars, giving him the legal right to institute the proceedings. He in no way claims that he is injured by the change, or is likely to be. The judgment of ouster against the city is claimed as a naked legal right. Had it been exercised with promptness, after the power was assumed by the city, we do not see why he should not have had his judgment. A thought is suggested that the delay was to permit the authorities to act. With the rapid changes made after the passage of the act (the new government being in operation in April, 1890), the tendency, as to results, was manifest; and it was apparent that to avoid great and important changes, involving many and large interests, action should be taken at once. Much less time than was taken was sufficient to apprise the relator that others did not intend to act. The way of inquiry was open to him to know

the facts, if he desired to know them, and, in view of the situation, promptness was demanded.

Appellant makes a comparison of the cases as to the time intervening between the adoption of the law and judgment, where laches was claimed as an estoppel. One case that we have cited is the same as this one, while in the others the time is longer. The time that will justify an estoppel, as we have said, varies with the cases; depending on what are the facts, and what is to be apprehended. Greater prejudice ⁵³⁸ may result from a delay of one year in some cases than from ten or twenty years in others. In our examination we have not found a case in which, with many more years of delay, the consequences to be apprehended from a judgment of ouster were as great as in this case.

We are not unmindful of the fact that the act in question attempts to extend the limits of the city by its own operation, instead of permitting it to be done, but we do not see that such fact should change the conclusion. The conditions out of which arise the necessity for the rule we apply are not the results of the enactment alone, but of the things done by the people relying upon it. By the act it is said that the limits of such cities "are hereby extended," and that, as to corporations in the outlying territory, it provides in terms that they shall "cease and determine." The people, in making the change, acted upon what purported to be fixed conditions; and these facts strengthen the equitable claim of the city that it should not be disturbed, at the instance of the state simply asserting the invalidity of its authority.

Finally, it may be said that, aside from the necessity of maintaining the integrity of the constitution against infractions from legislative action, there is not a reason suggested for, or a benefit anticipated from, the judgment sought in this proceeding. Such a judgment would disrupt the present peaceful and satisfactory arrangement of all the people of the city, as to its corporate existence, without a benefit, so far as we know, to any person. The law does not demand such a sacrifice for merely technical reasons. In fact, the constitutional vindication is complete with the declaration that the act is absolutely void. The judgment of the district court is affirmed.

MUNICIPAL CORPORATIONS—RIGHT TO QUESTION EXISTENCE OF.—A private citizen cannot question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city; nor can he in a private action question the due annexation to it of territory over which it has assumed to exercise jurisdiction for several years, under proceedings taken to effect such annexation: *Kuhn v. Port Townsend*, 12 Wash. 605; 50 Am. St. Rep. 911.

MUNICIPAL CORPORATIONS—ANNEXATION—CONSOLIDATION—POWER OF LEGISLATURE.—The legislature may not only originally fix the limits of a municipal corporation, but may, unless specially restrained by the constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent or even against the remonstrance of the majority of the residents of the corporation or of the annexed territory: *Mayor v. Shattuck*, 19 Colo. 104; 41 Am. St. Rep. 208, and note. See monographic note to *Mount Hope Cemetery v. Boston*, 85 Am. St. Rep. 539; *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661.

DAVIS v. PITCHER.

[97 Iowa, 13.]

MORTGAGES.—BOOKS OF ACCOUNT MAY BE MORTGAGED, in Iowa, like other personal property, subject to the same requirements as to certainty of description as are mortgages of other personal property.

MORTGAGES OF CHATTELS—DESCRIPTION.—A mortgage of chattels specifying the building in which they are, and purporting to include all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise kept in such building sufficiently describes the books of account and the accounts of the mortgagor subject to the mortgage.

MORTGAGE OF CHATTELS, TESTS OF SUFFICIENCY OF DESCRIPTION.—That description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property is sufficient.

Action to recover possession of books of account and accounts. A demurrer to the complaint having been sustained and judgment thereon entered in favor of the defendant, the plaintiff appealed.

Perry D. Rose, for the appellant.

F. M. Powers, for the appellee.

¹³ ROBINSON, J. On the twenty-second day of August, 1894, one Coe Davis executed and delivered to the plaintiff a mortgage on property which was described as follows: "The following goods and chattels, to wit: My entire stock of goods and merchandise, consisting principally of dry goods, groceries, boots and shoes, flour, salt, and other merchandise, now owned and kept by me in the one-story frame building, and a cellar thereunder, situated on the north half of the south two-thirds of lots No. sixteen and seventeen (16, 17), in block No. twenty (20), in the original town plat of Scranton, Greene county, Iowa; also, all furniture and ¹⁴ fixtures now in said building above described; also, all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise kept by me in said above-described building; also, all salt kept by me on the

north side of the building above described and just adjoining. This mortgage is also to cover all additions and accretions to said stock of merchandise above described when placed in building above described. The above-described chattels are now in my possession on the lots above described, which said building is now occupied by me as a general store. For the purpose of procuring the above loan, I hereby represent and certify to the second party that I am the lawful, absolute, and sole owner of the above-mentioned and described property, goods, and chattels." The mortgage was given to secure the payment of a note for three thousand dollars, and was duly recorded on the day it was given. After the recording of the mortgage, the defendant obtained possession of all the books of account and accounts arising from the sale of the merchandise described in the mortgage, by going into the building, and there taking possession of them, with the merchandise described in the mortgage. The books showed, when they were so taken, that the entries and accounts therein were on account of sales of merchandise. The plaintiff demands judgment for the possession of the books of account and accounts described, or, in case they cannot be found, for their value. The grounds of the demurrer are, in substance, that the description of the books and accounts contained in the mortgage is so vague and indefinite that as to them the mortgage is void for uncertainty. Whether the description given is sufficient as against third persons is the question we are required to determine.

Books of account may be mortgaged like other personal property, and are subject to the same ¹⁵ requirements as to certainty of description. Those in controversy were described as owned by the mortgagor and in his possession on the lots specified in the mortgage. There was no uncertainty in the description given of them. It is a settled rule of this state that a valid mortgage of accounts may be given: *Lawrence v. McKenzie*, 88 Iowa, 432; *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 568. But what is required to constitute a sufficient description has been and is the subject of much controversy. The rule in regard to descriptions in mortgages announced in *Smith v. McLean*, 24 Iowa, 322, and since frequently approved by this court, is as follows: "That description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient." In *Sperry v. Clarke*, 76 Iowa, 506, the description "our accounts due and to become due" was held to be insufficient. It was said not to show whether a part or all of the accounts of the mortgagors were in-

cluded, nor from what source those mortgaged were derived; but it was intimated that if the mortgage had contained a reference to a memorandum statement of the accounts, or a book containing a statement or memorandum thereof in the possession of some person, it would have been sufficient. In *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 568, the description, "all threshing machine accounts which we shall earn or shall become due us by the work of the above machine from now until this debt is paid in full," following a description of a separator and power, was held to be insufficient, for the reason that it contained nothing which would direct third persons to the property sought to be mortgaged. In *Lawrence v. McKenzie*, 88 Iowa, 432, the words "and book accounts," "and book accounts for goods sold," were held to be insufficient as descriptions in a chattel mortgage, and among the ¹⁶ reasons given for that conclusion were the following: that there was no attempt made to schedule the accounts; that the names and places of residence of the persons owing the accounts were not stated; and it was said that it is reasonable to expect, when accounts are mortgaged, the names of the debtors and the amounts they severally owe to be set out. The court did not intend to say, however, that the facts specified should be set out in all cases. Manifestly, it would be impossible to do so when the mortgage is intended to cover debts to be incurred after it is executed; and that a mortgage of such debts may be given was affirmed in *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 568. We are of the opinion that the general rule we have quoted from *Smith v. McLean*, 24 Iowa, 222, is applicable, and that, if the description in question comes within that rule, it is sufficient. The mortgage describes particularly the store building occupied by the mortgagor, and the entire stock of merchandise kept therein, and "all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise," which was described. Any reader of the mortgage would conclude at once that the accounts it was designated to cover would be found in the books of account, which, we have seen, were sufficiently described. The admitted facts make it clear that those books showed that the accounts therein were from the sales of merchandise; that the accounts were found, and possession thereof taken, by the defendant, in the store building in which they were stated to be; and that they were the accounts described in the mortgage. The defendant could not have been in doubt as to the accounts which the mortgage was designed to include. We conclude that the description in question was sufficient, and the judgment of the district court is therefore reversed.

CHATTEL MORTGAGES—DESCRIPTION OF SUBJECT MATTER—SUFFICIENCY OF.—A description in a chattel mortgage is sufficient if it will enable third persons, aided by the inquiries which the instrument indicates and directs, to identify the property: *Andregg v. Brunskill*, 87 Iowa, 351; 43 Am. St. Rep. 388, and note. See monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 239-247, as to the sufficiency of description in chattel mortgages.

McBRIDE v. BURLINGTON, CEDAR RAPIDS, AND NORTHERN RAILWAY COMPANY.

[97 IOWA, 91.]

STATUTE OF LIMITATIONS—FRAUDULENT CONCEALMENT OF NEGLIGENCE.—If a man is known to have been killed while in the employ of a railway corporation as a section hand, from the jumping from the track of a car in which he was riding, the fact that the corporation insisted that the killing was an accident for which it was not blamable, and that its car was in a good and safe condition, and that none of its employes were guilty of negligence, is not such a fraudulent concealment of a cause of action as prevents the running of the statute of limitations, and entitles the administrator of the decedent to maintain an action within two years from discovering that the injury to the decedent was the result of the negligence of the defendant or its agents.

To a complaint by the plaintiff as administratrix to recover for injuries resulting in the death of her intestate the defendant corporation demurred, and the demurrer being sustained, the plaintiff appealed.

Rickel, Crocker & Christie, for the appellant.

S. K. Tracy and J. C. Leonard, for the appellee.

82 **KINNE, J.** 1. This action is brought by plaintiff, as administratrix of the estate of John McBride, deceased, for the recovery of damages resulting from his death, which it is claimed was caused by the negligence of the defendant company. The petition is in four counts. The first count charges, in substance, that on August 14, 1888, plaintiff's intestate, John McBride, who was also her husband, was in the employ of the defendant company as a section hand, and that, while engaged in the proper performance of his duties as such, he, with other employes of the defendant company, was propelling a hand-car of defendant upon its track, and that said car "jumped" the track, and in falling said McBride was killed, by reason of the derailment of said car, and without fault on his part. That said car was not properly constructed, that it was out of repair and unfit for use, and that such condition was known to the defendant. That, by reason of its defective and dangerous condition, the injury resulted. That, intending to cheat and defraud plaintiff,

and the heirs of said estate, defendant falsely and fraudulently represented to plaintiff that the death of John McBride resulted from an accident; that defendant was in no manner to blame; that said car was not defective or out of repair. That upon said McBride's death, defendant caused said car to be removed to its shops, and its construction and identity to be so changed as to conceal the same. That plaintiff has been unable, by the exercise of due diligence, to acquire a knowledge of the facts; but the same have been concealed, actively and fraudulently from her; nor did she learn them until within one year prior to the bringing of this action. That she believed and relied upon the representations made to her, and was deceived thereby. The second count is substantially the same as the first. The third count sets ⁹³ forth the same facts, and claims damages, by reason of said fraud and deceit, in being deprived of her right of action. The fourth count is the same as the first, with the additional averment that, by reason of false and fraudulent representations of defendant, which were relied upon by plaintiff, she was induced to accept the sum of two hundred and fifty dollars in settlement of her claim for the death of her husband. Defendant demurred to all of said counts, because the cause of action, if any, was barred by the statute of limitations, and the averments of fraud did not defeat the bar of the statute. The court sustained the demurrer, and, the plaintiff refusing to plead further, and electing to stand upon her petition, judgment was entered dismissing her petition, and for costs. She appeals.

2. Our statute provides that all actions founded on injuries to the person, whether based upon contract or tort, must be brought within two years after their causes accrue: Code, sec. 2529, par. 1. Unless, therefore, there is something, outside of the statute itself, which has prevented its running, this action is barred. The contention of appellant is, that the facts alleged bring this case within the rule laid down by this court in the case of District Tp. of Boomer v. French, 40 Iowa, 601, and subsequent cases. It was held in the case referred to that, "when a party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment, prevented such other from obtaining a knowledge thereof, the statute of limitations would only commence to run from the time the cause of action was discovered, or might by the use of diligence have been discovered." This case, and others which we shall refer to, are, it is insisted, controlling in the case at bar. District Tp. of Boomer v. French, 40 Iowa, 601, was one where the defendant, who was the duly elected and acting treasurer of a ⁹⁴ school

district, had, during his term of office, received a large sum of money belonging to the district, which he appropriated to his own use, and upon a settlement with the district failed to account for. He had so kept his books, by means of false, fictitious, and fraudulent entries, and had practiced such concealments and misrepresentations, as to keep from the defendant's knowledge the fact of the receipt of said money. It was held that the cause of action did not grow out of the fraud, but existed independent of it, and the doctrine above stated was established. In *Bradford v. McCormick*, 71 Iowa, 130, the action was to recover from the defendant, a justice of the peace, and the sureties on his official bond, money which he had collected in 1882. The action was begun in 1885, some two years after the term of office of the justice had expired. The charge was, that he had fraudulently concealed from the plaintiff the fact that he had collected said money, and that he had converted it to his own use. It appeared upon the trial that the justice had reported to plaintiff that no money had been paid him on the judgment owned by plaintiff, and it was held such a fraudulent concealment as prevented the running of the statute. In *Wilder v. Secor*, 72 Iowa, 161, 2 Am. St. Rep. 236, the action was for the conversion of a draft sent for collection to defendants as attorneys. It appeared that the draft was sent to defendants to file as a claim against an estate. They filed the claim in their own name, and, being indebted to the estate, settled with the administrator, and set off the amount of the claim against their indebtedness to the estate. The facts were not disclosed to plaintiff for more than five years, and the defendants led the plaintiff to believe that the claim was allowed in his name and would be paid him. It was held that the cause of action accrued when the conversion took place, but defendants had ⁹⁵ fraudulently concealed the facts, and hence the statute had not run. *Carrier v. Chicago etc. Ry. Co.*, 79 Iowa, 86, and *Cook v. Chicago etc. Ry. Co.*, 81 Iowa, 563, 25 Am. St. Rep. 512, involved substantially the same facts. They were actions for the recovery of overcharges for freight shipped, and it appeared that defendant charged and received for transporting plaintiff's shipments a sum in excess of what was reasonable for the service rendered. The fraudulent concealment consisted in representing that the sums charged were the usual rates and the same rates that were charged all other shippers for the same service, which was untrue, and in fraudulently concealing from plaintiffs the fact that a less rate was charged other shippers for the same service. In all of these cases the cause of action existed independent of the fraud and

concealment, but, because of the concealment of the facts upon which the cause of action arose, it was held the actions were not barred by the statute. Now, in *District Tp. of Boomer v. French*, 40 Iowa, 601, the district had no knowledge within the period of limitations that the treasurer had received and converted the money. The same is true in *Bradford v. McCormick*, 71 Iowa, 130, and in *Wilder v. Secor*, 72 Iowa, 161, 2 Am. St. Rep. 236. In the railway cases all of the facts which would create a cause of action were concealed. We think these cases differ much from the one at bar. In the case at bar, what created a cause of action against defendant? Manifestly, the cause of action, if any existed, arose when McBride was killed. True it is that negligence could not be predicated against the company from the fact alone that McBride was killed while in their employment. Now, we are asked by counsel to go further, and hold that, although some of the facts which go to make up or give a right to a cause of action are known, still, because some of them are not made known or are concealed, therefore that is such a fraudulent concealment as will prevent the running of the statute. There was no concealment in this case of the fact that McBride was killed by the hand-car; that he was so killed while in the defendant's service. While it is true that one necessary ingredient of the cause of action—defendant's negligence—was concealed, still, every other fact which went to constitute a cause of action was known to plaintiff. The body of the cause of action, if we may call it such—the killing of McBride while in defendant's service—was never concealed. Now, if the defendant did not disclose to the plaintiff the particular facts as to how such accident occurred, or if it asserted that his death was accidental and its hand-car in good order, it is, at most, a concealment of evidence which might establish one element in a cause of action. We do not think the rule should be so extended. The demurrer was properly sustained.

Affirmed.

LIMITATIONS OF ACTIONS—CONCEALMENT OF CAUSE OF ACTION BY DEFENDANT.—The statute of limitations begins to run when the cause of action accrues, not from the time the knowledge of the fact comes to the plaintiff: *Note to Lewey v. Fricke Coke Co.*, 45 Am. St. Rep. 692. Ignorance of one's rights, or of the existence of facts entitling one to bring suit, does not stop the running of the statute of limitations from the time the cause of action accrued, unless it is occasioned by some improper conduct on the part of the defendant: *Monographic note to Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 515. When a party relies upon fraudulent concealment of a cause of action to take it out of the operation of the statute of limitations, the burden of proof is upon him to show that the opposing party can fraudulently conceal without some affirmative fraudulent act: *Wood v. Williams*, 142 Ill. 269; 34 Am. St. Rep. 79, and note.

PETERSON v. WOOD MOWING AND REAPING COMPANY.
[97 IOWA, 148.]

PRACTICE—EVIDENCE.—THE ORDER OF INTRODUCING EVIDENCE is so largely within the discretion of the trial court that its rulings will not be interfered with, unless they clearly establish an abuse of its discretion.

WARRANTY, WAIVER OF WRITTEN NOTICE OF.—If a purchaser, claiming that a machine does not conform to a warranty thereof, returns it to the agent of whom he purchased, and demands a return of notes given therefor, which the agent agrees to make, this is a waiver of the written notice of a breach of warranty, if the agent has authority to make such a waiver.

PRINCIPAL AND AGENT—WAIVER OF WRITTEN NOTICE.—Though a contract for the sale of a machine stipulates that if, when started, it does not work well, written notice shall immediately be given, and that no one is authorized to add to or abridge the warranty, yet if the agent of the seller is present when the trial is made, and knows from his own observation that the machine does not work well, and agrees to return the notes given by the purchaser therefor, this is a waiver of written notice.

CONTRACTS.—A STIPULATION THAT NO ONE HAS AUTHORITY to abridge, add to, or change a contract, or a warranty contained therein, is not binding on the parties, and any competent agent acting for them may waive by parol the provisions of the warranty.

PRINCIPAL AND AGENT—AGENTS AUTHORITY TO RETURN PURCHASE MONEY.—An agent having authority to set up a machine and to receive it back in the event it does not work properly and he cannot remedy the defect is authorized, on being notified of a defect which he does not remedy, to return notes which the purchaser has given on account of the purchase price.

Action to recover moneys paid for a harvester purchased by the plaintiff from the defendant, and which the plaintiff claimed did not satisfy the conditions of a warranty accompanying the sale. Judgment for the plaintiff; defendant appealed.

E. Y. Greenleaf, for the appellant.

Parsons & Van Wagenen, for the appellee.

149 **KINNE, J.** 1. Plaintiff ordered a reaping machine of the defendant, which he agreed to purchase subject to the following printed warranty: "All our machines are warranted to be well made and of good material, and to do good work, with proper management, when set up and operated as per printed directions. If, upon starting any of our machines, it should not work well, immediate written notice must be given to the Walter A. Wood Mowing and Reaping Machine Co., at Minneapolis, Minnesota, or the local agent from whom it was purchased, and reasonable time allowed to get to it and remedy the defects, if any (the purchaser rendering necessary and friendly assistance); when, if it cannot be made to do good work, it shall be returned, free of charge, to the place where received, and the

payment of money or notes will be returned. Failure to immediately give notice as above, or continued possession of the machine, whether it is kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty. No one has any authority to add to, abridge, or change this warranty in any manner." He claims that there was a breach of said warranty, in that said machine was not made of good material, and would not work well. That, in pursuance of the terms of said warranty, he notified the agent from whom he purchased the machine of said defects, and said agent undertook to remedy them, but was unable so to do, with all the assistance which plaintiff could render. That he ¹⁵⁰ offered to return the machine to the agent of whom it was purchased, and at the place of purchase, and said agent directed him not to return it, and refused to return to plaintiff his notes given for said machine. That the purchase price of this machine was one hundred and seventy-five dollars, and that said machine was worthless, and plaintiff had been damaged in that sum. In an amendment filed at the close of the testimony, plaintiff stated that at the time of the delivery of the machine to the defendant, at Ellsworth, Minnesota, the defendant accepted it and promised to return plaintiff's notes, and waived the requirement of the warranty as to written notice, and as to any further trial of the machine. Defendant denies all of the allegations of the petition and amendment thereto not expressly admitted or explained. Avers that the machine was sold to plaintiff for one hundred and twenty-five dollars; that plaintiff was satisfied with the machine, and executed his notes therefor; that plaintiff did not comply with the terms of the warranty, in that he retained the machine without making complaint; that he failed to give immediate notice to the defendant, or its selling agent, of the failure of the machine to work, as provided in the warranty; that he gave no time or opportunity to remedy any defects in said machine. Plaintiff, in a reply, denied all allegations of the answer which were inconsistent with the facts stated in the petition. The jury returned a verdict for the amount of the notes and interest, upon which judgment was entered. Defendant appeals. This action is brought by plaintiff to recover the purchase price of the machine—one hundred and twenty-five dollars—and interest.

2. While the evidence is conflicting, yet we think it shows that the machine was purchased of one McRoberts, the local agent of the defendant, at Ellsworth, Minnesota. The machine was taken home by the ¹⁵¹ plaintiff on Thursday, and tried in oats and timothy. That after a very little timothy had been cut, McRob-

erts told plaintiff if he would then give him the notes it would save him another trip back; and also told plaintiff if it did not work he would give his notes back. Plaintiff at the time told McRoberts that he was not satisfied with it. Plaintiff thereafter tried the machine in other grain, and it did not work well. It would not bind or elevate the grain. Either Saturday or Monday following, plaintiff went to see McRoberts, but could not find him. He left word with his wife, and returned the machine to the place from which he got it on Saturday or Monday. After plaintiff had started to haul the machine in, McRoberts went to plaintiff's place, but as he took another road he missed plaintiff. The evidence also shows that when McRoberts took the notes he must have known that the machine was not working properly. The same day the machine was returned, plaintiff demanded his notes of McRoberts, who refused to deliver them to him. Some days afterward, and when plaintiff was about done harvesting, McRoberts and one Andrews, a general agent of defendant, saw plaintiff, and endeavored to induce him to take the machine back and give it another trial, which plaintiff refused to do. It is conceded that plaintiff never gave any written notice to either the defendant or McRoberts.

3. Many of the questions discussed by counsel cannot be considered, because the assignment of errors is insufficient. This is true as to the first, fifth, sixth, seventh, eighth, thirteenth, and fifteenth assignments. They require us to examine the testimony in order to determine just what errors are claimed to have been committed in the admission of testimony. They do not point out the specific errors relied upon, as the statute ¹⁵² requires. They base error on the overruling of motions generally, which motions contain many separate grounds. The requirements of the statute in this respect are so plain, and the necessity for a reasonable compliance therewith has been so frequently pointed out in repeated decisions of this court, that we deem it unnecessary to again refer to the cases holding that such assignments raised no question for our consideration.

4. We proceed to a discussion of the questions as to which proper assignments of error are made. Plaintiff offered, and read in evidence against defendant's objections, the depositions of Magnus Larsen and Nels Rasmussen. Defendant objected to the reading of these depositions, because, as he claimed, it had not then been shown that plaintiff had complied with the terms of the warranty. These depositions tended to show that McRoberts was present when the machine was first started, that it did not work well, and that McRoberts admitted that fact.

Now, the fact, if such it was, that plaintiff had not then shown such a compliance on his part with the conditions of the warranty as would authorize a recovery was no reason for excluding these depositions. Plaintiff had not finished his case, and the court might well assume that, if any fact remained to be established, to entitle plaintiff to recover, evidence of it would be thereafter introduced. Furthermore, the order of the introduction of evidence is so largely a matter within the discretion of the trial court that we should not interfere with the rulings relating thereto, unless it clearly appeared that the court had abused its discretion in that respect: Kinne's Pleading, Practice, and Forms, sec. 484, and cases cited. There was no abuse of discretion in these rulings.

5. Error is assigned in the giving of paragraph 2 of the court's charge to the jury. It is said it ¹⁵³ improperly submitted to the jury the question of notice being given as to defects in the machine; also, that it was wrong in submitting the question as to whether plaintiff immediately returned the machine after discovering the defects, and that it erroneously assumed that it was the duty of the purchaser to immediately return the machine. This instruction was based upon the pleadings, as well as the evidence, and that fact is to be remembered; and, when the entire instruction is read in connection with all of the charge we do not think it is fairly open to the criticism made.

6. Paragraph 3 of the charge is objected to, because it is claimed that in it the jury were told that, if McRoberts, defendant's agent, received the machine, there was a waiver. Paragraph 4 is objected to, because it assumes that McRoberts had authority to agree to surrender the notes and to waive the requirements of the contract of warranty. We may consider all of these objections together. There was evidence showing that, after the machine was returned, McRoberts agreed to return the notes; and from that fact it is fair to assume that, if McRoberts had the power so to do, he waived the written notice called for by the contract of warranty, and also any further trial of the machine. The theory upon which the court submitted the case to the jury was that if the machine did not work as required by the warranty, and was not accepted as so doing by the plaintiff when he gave his notes for it, and it was returned to place of purchase to McRoberts immediately upon discovering that it would not work, and that McRoberts, as agent for the defendant, received the machine upon its return, and accepted it for defendant, and promised to return plaintiff his notes, then the jury should find for the plaintiffs. Now, appellant's contention

is, that while McRoberts, as ¹⁵⁴ agent of the defendant, might in a proper case waive the return of the machine, he had no authority as such agent to bind his principal by waiving the conditions of said warranty as to written notice, as to the trial of the machine, nor had he authority to enter into a binding agreement, outside of the terms of the warranty, to deliver to the plaintiff his notes. While the parties are bound by the contract of warranty, still it cannot be doubted that either party might waive the provisions contained therein so far as they were for his benefit. This contract required that when the machine was started, if it should not work well, immediate written notice should be given to defendant or to the local agent from whom it was purchased, and a reasonable time allowed to remedy the defects. Now, no written notice whatever was given. In this case, however, the agent who sold the machine was present when it was started; he knew it did not work well. He could not have been more fully in possession of all of the facts touching its failure to work properly if the written notice had been given. Every purpose of that provision of the contract had been accomplished by the personal presence of the agent, and the knowledge obtained by him of its operation. Under such circumstances, to have required a written notice was to compel the plaintiff to do a useless act, which would convey to the agent the very information he already possessed. There is no good reason for requiring notice under such circumstances. Nor have we any doubt that an agent authorized to sell such a machine, and to set it up, and to see that it works properly, may waive such a written notice, when, by his personal presence, he is in possession of knowledge of every fact which such notice could give him. It may be said that the contract provides "no one has any authority to add to, abridge, or change this warranty in any manner." If full effect ¹⁵⁵ should be given to this language, the defendant is powerless to even change or alter its contract, no matter though plaintiff should consent thereto. Such a provision in the contract, if held binding, is a prohibition for all time, and under all circumstances, against any change in the contract. It is inconceivable that the defendant ever intended to tie its hands in such a manner. A corporation can only act through its agents, and such agent must always have power to represent and act for it. Doubtless, such a prohibition upon the power of certain of its agents to change or abridge the contract would be good, but the one in controversy, which prohibits action in any event by the corporation, is unreasonable. Under this provision of the contract, its provisions could not be waived, changed, or abridged,

even if it should appear to be for the interest of all the parties to it to do so. Such an agreement is not binding, and any competent agent could bind the parties by waiving the provisions of the warranty: *Osborne v. Racker*, 81 Iowa, 378. Did the agent have authority to agree with plaintiff for a return of the notes? It appears he had authority to sell, to set up, and to see that the machine worked properly. There is no question as to his authority to have received the machine back when he discovered that it did not work properly, unless he could remedy the defect, which he did not do. It seems to us, under such circumstances, his right to agree to restore that which plaintiff had given for the machine is not to be doubted. Everything that McRoberts, the agent did touching the setting up and operating the machine, and the promise to return the notes, was in the line of an attempt to complete the sale, and within his authority: *Springfield etc. Thresher Co. v. Kennedy*, 7 Ind. App. 502. Under the facts disclosed in this record we think the instructions were proper.

Affirmed.

APPEAL—WHAT CONSIDERED ON—ORDER OF PROOF.—The order of proof is always within the discretion of the trial court, and will not be interfered with by the appellate court unless there has been an abuse of discretion: *Kindel v. Le Bert*, 23 Colo. 385; 58 Am. St. Rep. 234, and note.

SALES—RESCISSION FOR BREACH OF WARRANTY—AUTHORITY OF AGENT.—Where, on the sale of personalty, a warranty is given and the purchaser is required to give notice both to the vendor and his agent of alleged defects in the property, the vendee cannot recover for a breach of warranty where, though he gave notice to the agent, he did not to the vendor as stipulated for. Waiver of this notice on the part of the principal cannot be presumed from the act of such agent, nor from that of any employé who is not shown to have had special authority from the vendor to make such waiver: *Fahey v. Esterley Machine Co.*, 3 N. Dak. 220; 44 Am. St. Rep. 534. See, also, *Aultman etc. Co. v. Gunderson*, 6 S. Dak. 226; 55 Am. St. Rep. 837.

AGENCY.—THE AUTHORITY OF AN AGENT must be determined by the nature of his business and the apparent scope of his employment therein: *Brown v. Franklin etc. Ins. Co.*, 165 Mass. 505; 52 Am. St. Rep. 534, and note. A general agent may bind his principals by an act contrary to his special instructions, if such act be within the scope of his authority: *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415; 11 Am. St. Rep. 674, and note.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v. STARKWEATHER.

[97 IOWA, 159.]

EMINENT DOMAIN—TAKING PROPERTY ALREADY DEVOTED TO A PUBLIC USE.—It is not true that property devoted to one public use may not be subjected to another. Hence, a municipal corporation, authorized by its charter to open, widen, extend, and

establish public streets and to provide for the condemnation of such real estate as may be necessary for that purpose, and which is authorized to take private property for public streets in the same manner that railway corporations may take real estate necessary for their use, is authorized to extend a public street through railway depot grounds. They must be regarded as private property within the meaning of these words as used in the statute.

Certiorari to review the action of the common council of the town of Boyden in extending a street across the depot grounds of the Chicago, Milwaukee & St. Paul Railway Company. A judgment having been entered dismissing the petition, the company appealed.

Milt H. Allen, for the appellant.

Boles & Roth, for the appellees.

¹⁵⁹ ROBINSON, J. The plaintiff owns and operates a railway which extends from the city of Milwaukee, in the state of Wisconsin, westward, through Iowa, to ¹⁶⁰ Chamberlain, in South Dakota. The incorporated town of Boyden is on that line, in Sioux county, and the defendants are the mayor, trustees, and street commissioner of that town. The railway extends from east to west through the town, and separates the part which contains most of the inhabitants, and which is north of the depot grounds, from the part which is south of it. Main street extends from north to south on each side of the depot grounds, but prior to September, 1892, was not opened through them. In that month the council passed an ordinance, which, in terms, extended the street through the grounds; appropriating for that purpose a strip of land eighty feet wide, which connected the two parts of the street, and which, when opened, will make it continuous. Proceedings were then had, under section 1244 of the code, for the assessment of the damages to the plaintiff which the opening of the street would cause. They were assessed at fifty dollars. That sum was paid to the sheriff for the use of the plaintiff, and in December, 1892, a resolution was adopted by the council opening the street. In November, 1892, the plaintiff filed its petition in this case, alleging that the proceedings which had then been taken were illegal and void, for several reasons, and asking that they be annulled. A writ of certiorari was issued. A return thereto was made, and amendments to the petition, and an answer, were filed. A demurrer to the answer was overruled, and a trial was had, with the result already stated.

1. The plaintiff discusses the right of the defendant, in a proceeding by certiorari, to set out in an answer matters which do not relate to the jurisdiction to take the action of which complaint is made in the petition. We do not find it necessary to

determine the question thus presented, for the reason that nothing material was set out in the answer in this ¹⁶¹ case, of the character suggested, which would have prejudiced the plaintiff. We therefore express no opinion in regard to issues which may be presented by answer in certiorari proceedings. The important questions involved in this case were presented by the petition, the return, and the evidence.

2. It is claimed by the appellant that depot grounds are essentially public property; that they may be acquired by the exercise of the right of eminent domain, when they cannot be otherwise obtained; and that for these reasons they cannot be taken by means of that right. It is undoubtedly true that the railway and station grounds are operated and used in part for public purposes. The right of eminent domain rests upon the theory that property taken by virtue of it is to be used for the benefit of the public, and it cannot be exercised for any other than a public object: *Stewart v. Board etc.*, 30 Iowa, 19; 1 Am. Rep. 238; 1 Redfield on Railroads, 228; 6 Am. & Eng. Ency. of Law, 515. But it is not true that property devoted to one public use cannot be subjected to any other. It is within the power of the general assembly to make the same property subservient to different public uses, or even to take it from one public use, and devote it to another. Thus, the streets of a town or city may be used for the purposes to which streets are ordinarily devoted, and also for railway purposes: *Milburn v. Cedar Rapids*, 12 Iowa, 256; *Cook v. Burlington*, 30 Iowa, 105; 6 Am. Rep. 649. It was said in *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643, to be unquestionable, "that the legislature has the power to authorize the taking of land, already applied to one public use, and devote it to another." That doctrine is sustained by numerous authorities, among which are the following: *Bridgeport v. New York etc. R. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 71; *Boston Water Power Co. v. Boston etc. R. R. Corp.*, ¹⁶² 23 Pick. 390; *In re Buffalo*, 68 N. Y. 170; *In re Boston etc. R. R. Co.*, 53 N. Y. 576; *Hickok v. Hine*, 23 Ohio St. 523; 13 Am. Rep. 255; *Chicago etc. Ry. Co. v. Metropolitan etc. Ry. Co.*, 152 Ill. 519; *St. Louis etc. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82; *In re Mayor etc. of New York*, 135 N. Y. 253; 31 Am. St. Rep. 825; *Old Colony R. Co. v. Framingham Water Co.*, 153 Mass. 561; *Cincinnati etc. Ry. Co. v. Belle Center*, 48 Ohio St. 273; *Seymour v. Jeffersonville etc. R. R. Co.*, 126 Ind. 466; 6 Am. & Eng. Ency. of Law, 533; *Ft. Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 565; 32 Am. St. Rep. 277.

The doctrine is subject to the modification, however, that the power to take the property for the second public use, when such an appropriation would supersede or defeat the first one, must be given expressly or by necessary implication; and stress is placed on that modification by most of the authorities to which we have referred. The use of the strip of ground in question for railway depot purposes is in part for the public benefit, and therefore public. The use for which the town of Boyden appropriated it is also public; but the plaintiff has occupied and used it for railway purposes for many years, and its rights are prior, in point of time, to any which the town has acquired. It is true, the grounds were not obtained for the plaintiff through the exercise of the right of eminent domain, but by a conveyance from its owner; but it may be conceded, for the purposes of this case, that the method by which title was acquired is immaterial, so long as the use made of the land is a public one. The question remains to be determined whether, under the statutes of this state, the town was authorized to extend its street in the manner attempted, against the will of the plaintiff. It is said in Sutherland on Statutory Construction, section 388, that "there is a broad distinction ¹⁶⁸ between acts which subvert or essentially impair a prior franchise or appropriation to a public use, and acts which permit a taking for a new public use, not involving an entire deprivation or diversion from the first use, but a joint use, so that after the second taking the same property serves still the original purpose, as well as the new, and the two uses are consistent. Under a general power to lay out and establish a railroad or highway, other railroads or highways may be crossed." Cities and incorporated towns of this state "have power to lay off, open, widen, extend, establish, and light streets, and to provide for the condemnation of such real estate as may be necessary for such purposes": Code, sec. 464. They also have power to "purchase or condemn, and pay for out of the general fund, and enter upon and take any lands within or without the territorial limits of such city or town for the use of public squares, streets," and certain other purposes: Code, sec. 470. Section 1244 of the code provides a method by which railroad corporations may take and hold real estate necessary for their use; and section 1270 permits cities and incorporated towns to proceed in the same manner to take "private property for streets, alleys, and market house sites." The town of Boyden proceeded, under the two sections last cited, to appropriate the land in question; but it is said that no rights were acquired by so doing, for the reason that section 1270 permits the taking of

“private” property for the purposes stated, and it is insisted the property in question is not private, but public. This is not correct. It is true that the railway property is held for the public use, and, for many purposes, is subjected to legislative control; but the title thereto is vested in a private corporation, for the benefit of its stockholders and other private persons. To that extent the property is private (*Whiting v. Sheboygan etc. R. R. Co.*, 25 Wis. 167; 3 Am. Rep. 30; ¹⁶⁴ *Railroad Co. v. Commissioners*, 103 U. S. 4), and its use for the benefit of the public will not be materially affected by the taking in question. The extension of the street as proposed will cause some inconvenience to the plaintiff, in the operation of its trains, and will interfere with a platform of cinders which was constructed across the strip of land in question, after the ordinance appropriating it was passed. But the inconvenience thus caused will be inconsiderable, as compared with the benefit to the public which will result from the opening of the street. The depot grounds are fourteen hundred feet in length by three hundred feet in width. They are traversed by the main railway track and two side tracks of the plaintiff. The depot is near the middle of the grounds, measuring from east to west, and the proposed street will cross the grounds near the west end of the depot. No established street now crosses the right of way and the track of the plaintiff within the territorial limits of the town, although a crossing at the point in controversy was maintained and used for several years before the action in question was taken, and there is no ground for holding that the action of the council in deciding that the public interest requires the opening of the street is not conclusive: *Cherokee v. Sioux City etc. Land Co.*, 52 Iowa, 280. We are of the opinion that the statutes of this state, to which we have referred, authorized the opening of the street as proposed. They do not, in terms, provide for the taking of property already devoted to public uses, but the taking sought by the defendants would not exclude the plaintiff from its property, nor interfere materially with its use, the operation of its trains, and the transaction of its business. The exclusive right to use the railway as such will remain in the plaintiff, and the public will have the right to cross it at proper times, and by suitable means.

¹⁶⁵ Our conclusion has support in the authorities. In *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, it was held that the city could not take for a street, real estate which the depot company had acquired for its use, where that use was necessarily exclusive, and it would be practically subverted by the proposed taking and use for the street. But it was said that “the power to extend streets and highways across railway tracks

at suitable and convenient places, is necessarily implied in the general authority conferred on cities and towns for such purposes, without express provisions on the subject. In like manner, railroads necessarily cross streets and highways on their routes. An adjustment of the two public uses is thus demanded by public convenience and necessity, wherever practicable, and may well be presumed to be contemplated in the legislation authorizing such improvements and by corporations in accepting or acting under such legislation": See, also, *Little Miami etc. R. R. Co. v. Dayton*, 23 Ohio St. 510; *Morris etc. R. R. Co. v. Central R. R. Co.*, 31 N. J. L. 213; *Chicago etc. Ry. Co. v. Chicago etc. R. R. Co.*, 112 Ill. 589; *Bradley v. New York etc. R. R. Co.*, 21 Conn. 305.

The views we have expressed dispose of the controlling questions in the case. There does not appear to be any substantial ground for disturbing the judgment of the district court, and it is affirmed.

EMINENT DOMAIN—TAKING PROPERTY ALREADY DEVOTED TO PUBLIC USE.—It is a well-settled rule that the property of private corporations, including even their franchises, may be taken for public use, under the power of eminent domain, on making due compensation: Monographic note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 137; *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504; 50 Am. St. Rep. 508, and extended note. The legislature may authorize one corporation to take the property of another for public use, although such property is already devoted to a public use by the latter corporation, and was itself acquired under eminent domain proceedings: Monographic note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 139; note to *Lynch v. Forbes*, 42 Am. St. Rep. 407. But in such case the intention of the legislature must be shown by express words or necessary implication: *Louisville etc. Ry. Co. v. Whitley County Court*, 95 Ky. 215; 44 Am. St. Rep. 220, and note.

WELLS v. ANDERSON.

[97 IOWA, 201.]

HOMESTEAD.—THE FACT THAT AN INSOLVENT PAYS A MORTGAGE on his homestead out of his assets does not entitle his creditors to subject such homestead, to the extent of such payment, to the satisfaction of their demands, where it appears that the moneys for which the mortgage was given were used in his business and not to improve the homestead or to discharge any pre-existing lien thereon.

HOMESTEAD—DEFRAUDING CREDITORS.—A conveyance of a homestead by a husband to his wife cannot be a fraud upon his creditors, because it is not liable to their demand.

McMillen & Dunlap, for the appellants.

E. Y. Greenleaf, for the appellees.

202 ROTHROCK, C. J. The defendant, C. G. Anderson, was, for several years, engaged in the retail dry-goods business,

at Rock Rapids, in Lyon county. On the sixth day of January, 1892, he made a general assignment of all his property, for the benefit of all of his creditors, without preference. He commenced the business in the year 1884, or thereabouts. The plaintiffs are wholesale merchants, and, in the year 1891, they sold goods on credit to Anderson. They claim that Anderson obtained credit for the goods by fraudulent representations as to his ability to pay for them. And the evidence shows that when he made the assignment he was indebted for goods purchased in an amount far exceeding the value of the property then owned by him. We do not think it is necessary to state further facts in relation to the manner in which he obtained credit, nor as to the cause of his failure in business, for the reason that we believe that the rights of the parties must be determined upon the facts connected with the ownership of the homestead.

²⁰³ It appears that the homestead was acquired in the year 1884. It was paid for with the money of the husband, and the title was held in his name. The family, consisting of the husband, wife, and minor children, have occupied the homestead from the time it was acquired until the trial of the cases in the court below. It was encumbered until some time before the failure of the husband, when he borrowed the sum of two thousand dollars from a brother in law named Dunlap. It does not clearly appear when he borrowed this money. There is evidence tending to show that it was several years before he made the assignment. After this transaction, and on the twentieth day of July, 1891, Anderson conveyed the homestead to his wife. And after that time the husband and wife joined in a mortgage on the homestead, to secure the payment of the debt to Dunlap. On the twenty-first day of October, 1891, Anderson paid one thousand dollars of the debt secured by the mortgage, and, in November following, he paid the balance due to Dunlap. The money borrowed of Dunlap was used by Anderson in his business, and it was paid from money drawn out of the business. It does not appear that Anderson had any other source from which to pay his debts. And there is no claim that the money was borrowed to purchase or improve the homestead, or to pay a debt incurred in its acquisition. Under this state of facts, no interest in or part of the value of the homestead is liable for the husband's debts. The conveyance of the homestead by the husband to the wife was no fraud upon the creditors, because it was not liable for their claims; and the payment by the husband of a debt due to one of his creditors before he made an assignment was nothing more than the payment of a just obligation, and we can discover no reason why the other creditors should complain.

Appellants' contention is, that the homestead ²⁰⁴ should have been subjected to their claims, under the decisions of this court in the cases of *Croup v. Morton*, 49 Iowa, 16, 53 Iowa, 599, and *Hamill v. Henry*, 69 Iowa, 752. In *Croup's* case it was held that a homestead held in the name of the wife, to the purchase and improvement of which the husband has contributed, may, to the extent of his contributions, be subjected to the payment of his debts contracted prior to its purchase, and the case of *Hamill v. Henry*, 69 Iowa, 752, is to the same effect. The distinction between the case at bar and the cited cases is so obvious that discussion cannot make it plainer. The statement of the above facts is sufficient. The payment of a just debt by the husband—the debt being in no way connected with the acquisition of the homestead, and having no connection with the homestead, except that it was mortgaged to secure the debt—cannot be held to allow other creditors to put themselves in the place of the mortgagee. The case demands no further consideration, and the decree of the district court is affirmed.

HOMESTEAD—CONVEYANCE OF—RIGHTS OF CREDITORS. A transfer of a homestead cannot be fraudulent as against creditors of the grantor because they have no right to resort to it for the payment of their demands: *Pipkin v. Williams*, 57 Ark. 242; 38 Am. St. Rep. 241, and note; *Winter v. Ritchie*, 57 Kan. 212; 57 Am. St. Rep. 331, and note. This is true when the grantee is the grantor's wife and there is no consideration for the conveyance: *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554. See *Burkett v. Burkett*, 78 Cal. 310; 12 Am. St. Rep. 58, and note. On the sale of the homestead under execution, see monographic note to *Blue v. Blue*, 87 Am. Dec. 273-282.

GOODWIN v. PROVIDENT SAVINGS LIFE ASSURANCE ASSOCIATION.

[97 Iowa, 228.]

INSURANCE POLICIES MUST BE LIBERALLY CONSTRUED in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity, and where words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted.

INSURANCE, LIFE, SUICIDE AFTER TWO YEARS.— Though an application for life insurance stipulates that the insurer shall not assume liability for death of the insured by his own hand, yet if the policy declares that, subject to the stipulations requiring the payment of premiums on extrahazardous occupations, a claim under the policy by death occurring more than two years after its date shall be incontestable except for fraud in obtaining the policy, the insurer is liable for the death of the insured by his own hand occurring more than two years after the issuing of the policy.

INSURANCE, LIFE.—IN CASE OF CONFLICT BETWEEN THE PROVISIONS of a policy and statements contained in an application, the former controls.

INSURANCE—APPLICATION, WHAT IS A FAILURE TO ANNEX COPY OF TO THE POLICY.—If a copy of the application annexed to the policy does not correctly state the place to which notice of premiums shall be addressed, and omits some of the statements of the assured referring to his past afflictions and all of the examiner's report, the insurer must be deemed to have violated a statute requiring a copy of the application to be annexed to every policy.

CONTRACT, PLACE OF.—AN INSURANCE POLICY which was signed in New York and by which it is agreed that all premiums and losses shall be paid in that state, and that it shall be construed as having been made therein, is a contract thereof, though the assured to whom it was issued resides in another state.

LAWS OF OTHER STATES, PRESUMPTION RESPECTING.—In the absence of evidence to the contrary, the laws of the state of New York are presumed to be the same as those of this state.

LAWS OF OTHER STATES, EVIDENCE OF.—A book which purports to be the Revised Statutes, codes, and general laws of the state of New York, published by a private citizen, containing a printed certificate purporting to be that of the secretary of state, that so much of the matter contained in the book as purports to be a copy of the Revised Statutes is correctly transcribed is not evidence, under section 3718 of the code of Iowa, in the absence of any showing that the book was published under authority of the legislature or is usually received as evidence of the existing laws of that state.

INSURANCE, REINSTATEMENTS, APPLICATION, COPY OF WHEN MUST BE ANNEXED TO.—If a statute provides that all insurance corporations or associations shall, upon the issuing of a renewal of a policy, attach to, or indorse thereon, a true copy of any application or representation of the insured which, by the policy, is made a part thereof, and, on failing to do so, that the insurer shall not be permitted to prove any such application or representation, a reinstatement after forfeiture falls within the statute, and the insurer cannot plead any representation or application not attached to the policy or to the reinstatement.

INSURANCE.—A REINSTATEMENT of the insured after a forfeiture is not the making of a new contract where no different terms are agreed upon. It simply restores the old contracts, and the fact that the reinstatement occurred in a state different from that in which the policy was issued does not make it a contract of the state wherein the reinstatement took place.

INSURANCE.—A NOTICE OF THE MATURITY OF A PREMIUM which is improperly addressed and does not reach the assured cannot establish a forfeiture.

INSURANCE.—DECLARATIONS AND ADMISSIONS OF THE ASSURED are not binding upon the beneficiary.

INSURANCE.—A NOTICE OF THE CHANGE of the post-office address of the insured given to an agent of the insurer upon the street, and not in his office, is sufficient to bind his principal. The place where the notice is given is immaterial.

INSURANCE.—NOTICE GIVEN A BANK, which has authority from the insurer to collect and receive premiums and to issue receipts therefor, of a change in the postoffice address of the assured is binding on the insurer.

INSURANCE.—THERE IS NO PRESUMPTION THAT THE ASSURED RECEIVED NOTICE of the maturity of premiums where such notice is not mailed to his address, but is, on the other.

hand, sent to another city of which he was before that time a resident.

INSURANCE, PROOF THAT PREMIUMS DEMANDED WERE CORRECT.—Where the amount of a premium to be paid is variable, and a knowledge of the amount rests peculiarly with the insurer, he must show that the sum which he demanded was correct.

INSURANCE, LIFE—RENEWABLE POLICY.—A policy of life insurance which is renewable from quarter to quarter on payment of premiums less the return premium awarded, and provides that, subject to the payment of premiums, it shall be incontestable after two years, except for fraud, in obtaining it, is governed by the ordinary principles applicable to life insurance contracts.

Mills & Keeler and Hubbard & Dawley, for the appellant.

Charles A. Clark, for the appellee.

229 **DEEMER, J.** On the sixteenth day of November, 1887, the defendant, a corporation, doing a life insurance business, organized, and having its principal place in the state of New York, issued a policy of insurance to the plaintiff, upon the life of her husband, Matthew Goodwin, agreeing to pay her, in the event of the death of the assured, on or before noon of the sixteenth day of February, 1888, the sum of five thousand dollars. The policy was issued on what is known as the "renewable term plan," a method of insurance originated by the president of the defendant company, and first used in the year 1887. By the terms of the contract, the defendant agreed to renew and extend the insurance, during each successive quarter year, from the date thereof upon the payment, on or before the 16th of February, May, August, and November, in each successive year, during the life of the assured, of the premiums for the actual age attained, in accordance with a schedule of rates printed on the back of the policy, less the return premiums awarded thereon. Goodwin, the assured, died by his own hand, on the eleventh day of November, 1891, at the city of Chicago, in the state of Illinois. His widow, the beneficiary in the policy, brought this suit, having first given notice and made the proofs of death required by the terms of the policy. Defendant demurred to plaintiff's petition because there was no allegation therein that the policy had been renewed, from time to time, by the payment of premiums, and because the action was prematurely brought. The demurrer was sustained on the last ground, and overruled on the other, and **230** thereupon plaintiff filed an amended and supplemental petition, avoiding the defect reached by the demurrer, and pleading some other matters, not necessary to be here recited. The defendant, in answer, admitted the execution of the policy, and its renewal, from time to time, down to May 16, 1891; admitted the death

of Goodwin, but denied that the policy was in force at the time of his death. Defendant further pleaded, as a second division of his answer, that the assured made a written application for insurance, in which he agreed that the representations therein contained should be construed as warranties, and made the basis for the issuance of the policy, and that any false answers or statements should avoid the policy. It further pleaded that Goodwin represented in this application that he was in sound health, and was not then, and had not been, intemperate in the use of stimulants, and that he stated that he drank occasionally, but never to excess; that these representations were false and untrue; that Goodwin used intoxicating liquors habitually, and to excess; and that he made the representations he did with intent to deceive the defendant and procure the policy in suit. In the third division of the answer, the defendant pleaded other false and untrue statements made by Goodwin, respecting the place of his birth, and the condition of his health, which need not be more particularly set out. In the fourth division, the defendant pleaded that plaintiff and the assured wholly failed and neglected to pay the premiums necessary to be paid on May 16, 1891, in order to renew and extend the insurance from and after that date, and that the policy expired at that date by the express terms thereof; that thereafter, and on May 21, 1891, Goodwin applied for reinstatement in the defendant company, and, as a basis thereof, presented a health certificate, in which, among other things, he stated ²⁸¹ that he was then in good health, and had been since May 16, 1891; that, in truth and in fact, Goodwin was not in good health and free from disease, and was not temperate in his habits, when he made the certificate of health. The fifth division pleaded failure of Goodwin, or plaintiff, to pay the quarterly premium, due August 16, 1891, in order to extend the policy, and alleges that written notice of the amount of such premium, and of the place where the person to whom payment might be made, was mailed the assured, on July 15, 1891—the letter being addressed to him, at Fifteenth and Harney streets, Omaha, Nebraska, that being his last known postoffice address, and the one fixed by him in the application for insurance to which notice should be sent. The sixth division of the answer merely pleads the failure of Goodwin, or plaintiff, to pay the premium due August 16, 1891, and further alleges that the statutes of the state of New York, which, it is claimed, should govern and control the contract in suit, requiring notice, etc., did not apply to policies like the one in suit. In the seventh division, the defendant averred that the application of Goodwin contained this statement: "It is agreed that

death by my own hand or act (except when mentally unaccountable), or death in violation of, or attempt to violate, law, are risks not at any time assumed by the society under the policy applied for." And defendant further averred that Goodwin took his own life while mentally accountable, and, therefore, there was no liability on the part of the company. The plaintiff demurred to the fourth division of the answer, because the representations there pleaded were not made in the application for insurance, and for the further reason that, by the terms of the policy, it was incontestable, except for fraud, in obtaining the policy in the first instance; to the fifth division, because of several alleged defects in the ²³² notice sent out by defendant company; to the sixth, because no computation had been made by the company as to the amount of the quarterly premium Goodwin should pay, no deductions or allowances having been made on account of any surplus portion of preceding payments not needed for death or quarterly fund; to the seventh, for the reason that the policy sued on became and was incontestable, except for fraud in obtaining it. This demurrer was sustained as to the fourth and seventh divisions of defendant's answer, and overruled as to the fifth and sixth, each party excepting. Thereupon, defendant amended the fourth division, by pleading discovery of the falsity of the representations therein referred to, on July 1, 1892, and offered to confess judgment for the amount of the premium paid May 21, 1891. Thereafter, other pleadings were filed by each of the parties; the defendant, among other things, alleging that the contract of reinstatement in May, 1891, was a Nebraska contract, and that there was no law of that state requiring that a copy of the certificate of death be attached to, or made a part of, the policy. The defendant further pleaded that the original application for insurance was made in Nebraska, and the policy delivered in Omaha, in that state, and that there was no law in either the state of Nebraska or the state of New York requiring a copy, or copies, of the application to be attached to, or incorporated in, said policy. Such were the issues on which the cause was tried. The court, however, in its instructions to the jury, eliminated all questions made by the pleadings, save the issue as to the nonpayment of the quarterly premium, claimed to have been due August 16, 1891. The jury found for the plaintiff on the questions of fact presented, and with their findings we are not called upon to interfere. The questions presented by this appeal arise upon the sustaining of ²³³ plaintiff's demurrer to certain divisions of the answer, the rulings of the court, during the trial, and the giving and refusing of instructions to the jury.

1. The first question presented in argument relates to the sufficiency of the seventh division of the defendant's answer. The application which Goodwin made for his insurance contained a statement which, if standing alone, would avoid the plaintiff's cause of action, for it is conceded that Goodwin committed suicide. But the policy contained this provision: "Subject to the stipulations regarding payment of premiums, and extrahazardous occupations, claim under this policy by death occurring two or more years after its date will be incontestable, except for fraud in obtaining this policy." If there were nothing more to the case than this provision of the policy, there would be no doubt that plaintiff's claim could not be defeated, because her husband took his own life; for a claim under the policy by death occurring two or more years after its date was incontestable, except for fraud. We have a case, then, for construction of these seemingly ambiguous and conflicting provisions. The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted: *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *National Bank v. Insurance Co.*, 95 U. S. 673; *Moulton v. American Life Ins. Co.*, 111 U. S. 335; *Wadsworth v. Jewelers' etc. Co.*, 132 N. Y. 540; *Fitch v. American etc. Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372; *Garretson v. Equitable etc. Assn.*, 74 Iowa, 419; ²³⁴ *Meyer v. Fidelity etc. Co.*, 96 Iowa, 378; ante, p. 374; *Collins v. Merchants' etc. Ins. Co.*, 95 Iowa, 540; 58 Am. St. Rep. 438. Now, by the terms of the policy it was incontestable, after two years from its date, except for fraud in procuring it, subject, however, to the stipulations regarding payment of premiums, and extrahazardous occupations. That is to say, claims under the policy by reason of the death of the assured were not to be controverted or disputed, except for some of the reasons stated, and death by suicide is not one of them. It will be observed that the clause on which the defendant relies is not found in the policy in suit, but in the application, which preceded it in point of time, and there is significance in the fact that the words used in the application were not carried forward into the policy. Another rule for interpretation may well be used here, which is that when there is a conflict between the provisions of the policy and the statements contained in the application, the former controls. Defendant's counsel contend with

much plausibility that death by suicide was a risk not contemplated by the parties, nor covered by the policy. But we think such a holding would import into the terms of a policy something not found therein, and not contemplated by the parties—at least, not by the assured—at the time the policy was issued. And, as said in *Wadsworth v. Jewelers' etc. Co.*, 132 N. Y. 540, “we should adopt that construction which we think the insurer had reason to suppose was understood by the insured.” The proper construction of this policy, taken in connection with the application, we think, is that the policy does not cover death by suicide, occurring within two years from the date of its delivery, but that after two years it is incontestable, except upon the grounds stated therein. This construction will give effect to all the provisions of the policy, and as such a result is always sought after by ²⁸⁵ courts, in interpreting all classes of contracts, we are quite content with it. We are the better satisfied with this conclusion, because it seems that, in life insurance, certain companies limit the operation of the conditions as to suicide to a fixed period, and make their policies incontestable on that ground thereafter: 13 *Encyclopedia Britannica*, 179. For the reasons suggested, as well as for others which might be offered, we think the demurrer to the seventh division of the answer was properly sustained. The case of *Mareck v. Mutual Reserve etc. Assn.*, 62 Minn. 39, 54 Am. St. Rep. 613, from the supreme court of Minnesota is directly in point; and, while we do not concur in all the reasoning of that opinion, we are satisfied that the result reached is correct.

2. Defendant complains of the ruling on the demurrer, as to the fourth division of the answer. It is sufficient to say at this time, with reference to this count, that the defendant amended it after the ruling on the demurrer, and no attack was made upon the division as amended, by demurrer or otherwise. True, the court withdrew the defense pleaded by this division from the jury, but this had no relation to the ruling on the demurrer. There is nothing here to complain of, even if it be conceded that the demurrer was improperly sustained.

3. The lower court withdrew from the jury all defenses based upon the application, or the certificate for reinstatement, for the reason that no full or correct copy of the application, and no copy of the certificate, were annexed to the policy. These holdings of the court are complained of. It is insisted that a substantially correct copy of the application was attached to the policy, and that, if it be conceded that the copy was insufficient, yet, as the contract was made either in the state of New York

or of Nebraska, and as there is no law in either of said states requiring a copy of the application to be ²³⁶ attached, it may rely upon any false statements or warranties contained in the application. The original application and policy of insurance have been certified up for our inspection, to aid us in determining whether a true copy of the application was attached to the policy, and an examination of them leads us to the conclusion that the statute, hereinafter referred to, has not been complied with. Among other things, the places to which notices of premiums shall be addressed is incorrectly stated in the copy. Again, some of the statements made by the assured with reference to his past afflictions were not carried out in the copy attached to the policy, and no part of the examiner's report is included in the copy attached. The relevancy of this omission is made apparent by McLain's Code, section 1733, which provides that: "All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon, a true copy of any application or representation of the assured, which, by the terms of the policy, are made a part thereof, or of the contract of insurance or referred to therein, or which may, in any manner, affect the validity of such policy. The omission to do so shall not render the policy invalid, but, if any company or association neglects to comply with the requirements of this section, it shall be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or any falsity thereof, or any parts thereof, in any action upon such policy." As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these states. The policy was signed by the president and secretary of the company in the city of New York. The premiums are made payable there, and the amount of the policy was to be paid, in the event of the death of the ²³⁷ assured, at the city of New York. It was also expressly agreed that the policy should be construed to have been made in the state of New York. It was, therefore, a New York contract, and is to be governed by the laws of that state: Richards on Insurance, sec. 44. Now, in the absence of all proof to the contrary, the laws of the state of New York are presumed to be the same as in this state: Seiverts v. National Ben. Assn., 95 Iowa, 710. The defendant, upon the trial, attempted to prove that there was, and is, no such statute in the state of New York as the one before quoted, and for this purpose offered in evidence four volumes of books, entitled, "The Revised Statutes, Codes, and General Laws of the State of New York," which purport to contain the text, carefully compared with the original, of all the

general statutory laws of the state in force January 1, 1890, published by one Clarence F. Birdseye, of the New York bar. What purports to be a printed certificate of the secretary of state is also in one of these volumes, to the effect that so much of the matter contained in the text of this edition of the Revised Statutes as purports to be a copy thereof is a correct transcript of the text of the Revised Statutes as originally published under the authority of the state, except such typographical errors in the original as have been corrected in the copy, and except such parts as have been altered by the acts of the legislature, and that, with respect to such parts, it conforms to the acts by which such alterations have been made. None of these volumes purport to have been published under the authority of the legislature of New York, nor were they proved to be commonly admitted as evidence of the existing laws of that state in the courts thereof, as required by section 3718 of the code of Iowa. They were, therefore, inadmissible, and the court below properly rejected them. We return, then, to the presumption that the law of New ²³⁸ York was the same, with reference to attaching copies of the application, as it is here, and the conclusion is inevitable that defendant cannot rely upon any alleged false representations or warranties in the application for insurance. It is argued, however, that the reinstatement or renewal, which was made in May, 1891, when the assured furnished the health certificate, was a Nebraska contract, and that there is no law of that state requiring copies of the application or certificate of health to be annexed to the policy, and that if this be not true, the statute of this state does not apply to renewals or reinstatements. Adverting to this last claim first, it is sufficient to say that the statute we have quoted is about as broad as language can make it, and we think it covers a renewal or reinstatement of the policy. Moreover, the reinstatement was not the making of a new contract, for no new or different terms were agreed upon. It was simply the cancellation of a forfeiture, whereupon the contract was restored, and recognized as binding by the company: *Lindsey v. Western etc. Aid Soc.*, 84 Iowa, 734; *French v. Mutual etc. Assn.*, 111 N. C. 391; 32 Am. St. Rep. 803. The contract remained a New York contract after the reinstatement, the same as it was before, and must be governed by the laws of that state. It is further to be noted that the application for reinstatement was accepted at the home office, in New York, and it is affirmatively shown that no officer or agent of the defendant in Nebraska had authority to make reinstatements or renewals. The defendant offered in evidence a copy of the *Compiled Statutes of the state of Nebraska*, which were rejected by

the court below. We are inclined to think these statutes were sufficiently identified, but, for the reasons above suggested, they were properly rejected. But, aside from all this, we do not think the company established a ground for forfeiture, because of nonpayment of the ²³⁹ May, 1891, premium. The notice which was sent the assured of the maturity of the premium was improperly addressed, and did not reach the assured, but was returned to the company. And there is no showing as to the amount due in May, for the nonpayment of which the forfeiture is asked. The defendant relies upon the statements made by the assured as to the amount due and as to the alleged forfeiture. It seems to be well settled, however, that his declarations are not binding upon the beneficiary: 2 May on Insurance, sec. 579 a; Union etc. Ins. Co. v. Cheever, 36 Ohio St. 201; 38 Am. Rep. 573; Bliss on Insurance, sec. 383; Washington Life Ins. Co. v. Hancy, 10 Kan. 525; Seiverts v. National Ben. Assn., 95 Iowa, 710. The court below was right in refusing to submit the question of misrepresentations in the certificate of health.

4. We turn now to the alleged forfeiture for failure to pay the August, 1891, premium. It was conceded by both parties that the law of the state of New York required that the defendant, before it could forfeit a policy for nonpayment of premium, should, at least thirty, and not more than sixty, days prior to the day when the premium is payable, address and mail, postpaid, to the assured, at his or her last known postoffice address, a written or printed notice, stating the amount of such premium, the place where and the person to whom payable, and that unless the same should be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy, and all payments thereon, will become forfeited and void. It appears from the evidence that the defendant, on the fifteenth day of July, 1891, addressed a notice to Matt Goodwin, of the maturity of the August 16, 1891, premium. This notice was addressed to the assured, at Fifteenth and Harney streets, Omaha, Nebraska. Now, it ²⁴⁰ is claimed by the company that this notice was addressed to the last-named postoffice address of Goodwin, while the plaintiff insists that both she and the assured gave notice to the defendant's agents of a change of address. This notice is claimed to have been given one Hall, a general agent of the defendant company, upon the streets of the city of Omaha, and to the Commercial National Bank of Omaha, which, for a time, at least, was charged with the duty of collecting premiums. The lower court submitted to the jury,

the question as to whether there was notice of a change of address given to either of these agents, and instructed that, if there was, then there was no forfeiture. We think there was ample evidence to sustain the instructions. The notice to Hall is not denied, but it is claimed that it was given to him upon the street in a casual conversation, and therefore, was not binding upon the company. There was evidence tending to show that Hall was a general agent, and uncontradicted evidence that he received the notice. And we think it was given to him in such a manner as to bind his principal. The place where the notice is given is entirely immaterial, if it was conveyed to him as agent of the company, and for the purpose of having it act thereon. According to the evidence, Hall was directed to change the address from Fifteenth and Harney to the general delivery. On the thirteenth day of July, 1891, Mrs. Goodwin wrote a letter to the Commercial National Bank, which bank was then collecting premiums for defendant, to forward all notices of assessments under her husband's policy to 57 Twenty-third street, Chicago, Illinois. This letter was received by the bank July 15th, and on the 16th it notified the defendant to send notice as requested. This notice was received by the company July 20, 1891. The only question with reference to this notice of July 13, ²⁴¹ 1891, is, whether it was binding upon the defendant. Appellant contends that notice to the bank was not notice to it, for the reason that it had no authority whatever, except to collect and receive premiums, and to deliver receipts to the assured. It seems that this question has heretofore been decided by this court adversely to appellant, in the cases of *Mayer v. Mutual Life Ins. Co.*, 38 Iowa, 304; 18 Am. Rep. 34; *Loughridge v. Iowa Life etc. Assn.*, 84 Iowa, 141, and authorities cited. The authorities cited by appellant's counsel are not in point.

5. It is also insisted that there was evidence to show that the assured received the notice, although it may have been incorrectly addressed; that it in fact went to the general delivery, where the assured directed it should go, and, as it was never returned to the defendant company, the presumption obtains that it was delivered. It is sufficient to say, in answer to this contention, that no such issue was made in the pleading. The claim was, that a notice was sent, as required by the New York statutes, to the last known postoffice address of the assured, and, as payment was not made within the time allowed thereby, that the policy was forfeited. The defendant did not, in any of its pleadings, aver that the assured had actual notice of the maturity of the premium. But, aside from all this, the notice was not addressed to the city or town where the assured at the

time resided. He was then living in Chicago, and it seems to be a well-established rule that, under such circumstances, no presumption arises that the addressee received the notice: See *Henderson v. Carbondale etc. Coke Co.*, 140 U. S. 25; 2 Wharton on Evidence, sec. 1323; *Carter v. Brooklyn Life Ins. Co.*, 110 N. Y. 15; *Garretson v. Equitable etc. Assn.*, 74 Iowa, 419; *Garbutt v. Citizens' etc. Assn.*, 84 Iowa, 294; ²⁴² *Phelan v. Northwestern etc. Ins. Co.*, 113 N. Y. 147; 10 Am. St. Rep. 441. The court did not err in refusing to submit the question as to the actual receipt of the notice by the assured, or in refusing to give the instructions asked by defendant upon this subject,

6. Complaint is made of the fifth paragraph of the court's charge, which required the defendant to show that the sum claimed as premium, i. e., eighteen dollars and sixty-five cents, was the correct amount which was due in August, 1891, after awarding and deducting return premiums for that quarter, etc. No valid objection can be lodged against this instruction, in view of the terms of the policy, which provide that the premium which could be required, was "less the return premiums awarded," and that "maximum quarterly premiums were to be reduced in each case by surplus portion of preceding payments not needed for the death fund and quarterly fund." It appears that in every instance these return premiums had been deducted from premiums previously paid, and that they varied in amount. Knowledge as to the amount of the return premiums was solely in the possession of defendant, and, under well-known rules, the burden was upon it to prove the amount thereof. Plaintiff could not do it, as she had no data upon which to act. This is merely stating a general rule—that where the amount of the premium to be paid is variable, and knowledge as to the amount rests peculiarly with the company, that it must show that the amount demanded was the correct sum: *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261; *Underwood v. Iowa Legion of Honor*, 66 Iowa, 134; 2 May on Insurance, sec. 345 a. The instructions given by the court with reference to this subject were correct, and those asked by defendant, in so far as they embodied correct rules of law, were given by the court.

²⁴³ 7. Certain errors are assigned in the admission and rejection of testimony. We need not set them out. It is sufficient to say that we discover no error. The questions presented are unimportant, and this opinion has already grown too long.

8. Some claim is made that the policy in suit, being a renewable one, from quarter to quarter, is not governed by the ordinary principles applicable to life insurance contracts. Suffice it to say, in answer to this claim, that we see no merit in it. The

policy in suit is a continuing one. It gave the assured and his beneficiary the right to make it incontestable as to certain matters, and this they did by the payment of premiums for more than two years. It also gave them the right to deductions for return premiums, as before stated, and promised them an additional credit at the end of ten years. Construed with such of the provisions of the New York statutes as we have, it clearly appears that it should have no other effect than an ordinary life policy, which could be forfeited for nonpayment of premiums the same as other insurance policies. The contract was one of insurance, pure and simple; and the ingenuity of the author should not be allowed to work a fraud or injustice upon those who confided in the belief that upon payment of premiums after notice, as required by the statutes of New York, they, after the expiration of two years, had an incontestable policy. We have patiently considered the whole case, and examined a long line of authorities cited by counsel on either side, and have also made an independent search for cases which would aid us in disposing of the questions presented; and, while we have not discussed every proposition presented, we have considered those matters which we believe to be controlling, and are of the opinion that the judgment should be affirmed.

LAWS OF OTHER STATE—PRESUMPTION CONCERNING.—If there is no proof of the law of another state, nor judicial knowledge of the origin of such state, such as raises the presumption that the common law prevails there, it is presumed that the law of the forum in which the issue is being tried is the law of that state on the question under consideration: *Peet v. Hatcher*, 112 Ala. 514; 57 Am. St. Rep. 45, and note; *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470, and note.

INSURANCE—CONSTRUCTION OF POLICY.—If there is doubt or uncertainty as to the meaning of terms employed in a policy of insurance, the language must be liberally construed in favor of the assured so as not to defeat, without a plain necessity, his claim to indemnity, which in effecting the insurance it was his object to secure: *Traveler's Ins. Co. v. Dunlap*, 160 Ill. 642; 52 Am. St. Rep. 355, and note. But construction must not make a new contract for the parties: *Schuermann v. Dwelling House Ins. Co.*, 161 Ill. 437; 52 Am. St. Rep. 377, and note.

INSURANCE—PLACE OF CONTRACT.—A contract of insurance, where the insurer and the assured reside in different states, may adopt the law of either state by express provisions contained in such contract, and, when such is the case, it will be deemed a contract of the state thus adopted: Monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 51. See *Daggs v. Orient Ins. Co.*, 136 Mo. 382; 58 Am. St. Rep. 638, and note.

INSURANCE—CONSTRUCTION OF POLICY—INCONTESTABLE CLAUSE—SUICIDE OF INSURED.—A life assurance association issuing a policy providing that it does not assume the risk of the death of the insured if caused by his own hand, but that such condition may be waived in writing, and then providing that after five

years from the date of the policy it shall be "incontestable from any cause" except nonpayment of dues or mortuary assessments, if the age of the applicant is correctly stated, is liable for the full amount of the policy if the insured commits suicide or dies by his own hand more than five years after the policy is issued, provided the insured has stated his age correctly, and all dues and mortuary assessments have been paid up to the time of his death: *Mareck v. Mutual etc. Assn.*, 62 Minn. 39; 54 Am. St. Rep. 613, and note.

INSURANCE—ASSESSMENTS—FORFEITURE FOR NONPAYMENT.—No presumption arises in favor of the regularity or legality of the assessments of a mutual benefit society: *American etc. Aid Soc. v. Helburn*, 85 Ky. 1; 7 Am. St. Rep. 571. Assessments not legally made need not be paid, and no rights are lost by nonpayment: *Note to Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 784. To make a member liable for an assessment, notice must reach him. Notice sent by mail is effectual if actually received, but the association takes the risk of its reaching him. Until it does, he is not chargeable therewith: *Monographic note to Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 574.

INSURANCE—LIFE—REINSTATEMENT—EFFECT OF.—The effect of the reinstatement of the assured after his policy has been forfeited is to revive the original contract: *Monographic note to Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 577.

COOK v. PRINDLE.

[97 IOWA, 464.]

MORTGAGE, AFTER-ACQUIRED TITLE, WHEN NOT AFFECTED BY.—If the mortgagors own an undivided interest only, and they intend to give, and the mortgagee to receive, a mortgage restricted to that interest, but, by mistake, the mortgage describes an interest in severalty, title subsequently acquired by the mortgagors is not subject to the mortgage, though the code provides that, when a deed purports to convey a greater interest than the grantor was at the time possessed of, any subsequent interest inures to the benefit of the grantee.

MORTGAGE, REVIVING AFTER BARRED BY THE STATUTE OF LIMITATIONS.—A mortgagor who has parted with the title to land cannot afterward revive the mortgage debt if it has become barred by the statute of limitations, so as to continue the lien of the mortgage as against one who purchased when the mortgage appeared to be barred and without notice of the attempted revivor.

Suit in equity for the foreclosure of a mortgage. The decree entered granted part of the relief asked by the plaintiffs, but denied them other relief, and they thereupon appealed.

P. Henry Smythe, for the appellants.

A. M. Antrobus, C. L. Poor, and Seerley & Clark, for the appellees.

A. H. Stutsman and W. W. Dodge, for the intervenors.

465 KINNE, J. 1. A rehearing was granted in this cause, and it has been again submitted to us for determination. The original opinion may be found in 63 N. W. Rep. 187.

April 1, 1870, Abial Prindle, Cordelia Prindle, Sarah A. Prindle, and Catherine Prindle, executed to David W. Grimes their promissory note for eleven hundred and thirty dollars and forty cents, due two years after date, and drawing ten per cent interest, payable annually. August 1, 1870, the same defendants executed a mortgage, to secure the payment of said note, upon certain real estate. Said mortgage was duly recorded. This suit is brought for a judgment on said note, and for the foreclosure of said mortgage. February 15, 1882, the makers of said note and mortgage indorsed upon the back of said note the following: "We do hereby admit that this note, with interest, is unpaid, and renew the promise therein contained to pay the same, and the mortgage given to secure the same is to stand and continue in force for the security thereof." This was signed by all of the makers of the note. January 25, 1876, said Prindles conveyed to the defendant, Lukenbill, forty acres of the land, which was embraced in their mortgage to Grimes. Lukenbill took immediate possession of said land, and continued to occupy it until September 17, 1888, when he conveyed the same to intervenor Sackrison, who has ever since been in possession of it. April 16, 1886, said Prindles executed their note to E. Rabb, for three thousand dollars, and secured the same by a mortgage, embracing all the land included within plaintiff's mortgage, and other lands, except that the Lukenbill forty acres was not embraced therein. Afterward, the Rabb note and mortgage were assigned to the defendant, J. J. Seerley, and by him to his wife, L. L. Seerley. April 28, ⁴⁶⁶ 1887, said Prindles executed their note to L. L. Seerley, for one thousand dollars, and secured the same by a mortgage upon the lands in controversy, except the Lukenbill forty and other lands. March 20, 1888, said Prindles executed their note to L. L. Seerley, for seventeen hundred and fifty dollars, and secured the same by mortgage upon the same lands. November 5, 1891, defendant Worthington obtained three judgments in the district court of Des Moines county against the defendant A. H. Prindle. At the tax sale, on December 2, 1889, C. C. Clark purchased the real estate in question, except the forty acres, for the taxes of 1888, and thereafter assigned the certificates to the defendant J. J. Seerley, who received the tax deeds for the land after the commencement of this action, to wit, December 17, 1892. Defendants Prindle answered, averring that at the time they executed the mortgage to Grimes, they only owned four undivided sevenths of the land described in the mortgage, and that, by mistake, said mortgage was so drawn as to cover the full title to said land. They asked that the mortgage be reformed. They also pleaded that, at the

time the indorsement was made on the Grimes note, it was verbally agreed that the rate of interest should be six per cent. The other defendants joined in these allegations. Lukenbill answered, setting out the conveyance of the forty acres by the Prindles to himself, and his conveyance of the same to Sackrison, and asking to be dismissed, with his costs. Sackrison intervened, and pleaded that he purchased the forty acres of Lukenbill and wife in good faith, and without knowledge that there was a valid mortgage on the same; that plaintiffs' mortgage was barred; that the attempted renewal of said Grimes' note and mortgage was after the sale to his grantor, Lukenbill, and after the grantors had parted with all their interest in said land, ⁴⁰⁷ and was without effect as against him; that intervenors had no notice, or knowledge, of said renewal when he made his purchase; and that Grimes knew of Lukenbill's purchase. He asks that said Grimes' mortgage be canceled as to his land, and that his title be quieted. Defendant Worthington answered, setting up her judgments, and joining in the allegation that the Grimes mortgage was only intended to convey four-sevenths of the land, and averred that A. H. Prindle had acquired title to the other three-sevenths of said land since the execution of the Grimes mortgage, and prior to the recovery of her judgments, and she claims a lien prior to said mortgage on said three-sevenths interest in said land. Plaintiffs contend that the three-sevenths interest acquired by A. H. Prindle inured to their benefit under the Grimes mortgage. Defendant L. L. Seerley joins in the claim for the correction of plaintiffs' mortgage, and contends that said mortgage is junior to her mortgages, except as to the four-sevenths of the land owned by the Prindles. She asks a judgment and decree of foreclosure on her three notes and mortgages, and that her rights be decreed superior to those of defendant Worthington, and against plaintiffs, as to said three-sevenths of said land. Plaintiffs aver that J. J. Seerley and C. C. Clark, his partner, were attorneys in this case for the defendants Prindle, L. L. Seerley, and Worthington: that J. J. Seerley procured said tax title in secret trust, for the use and benefit of his said clients, and fraudulently seeks to use the same to defeat plaintiffs' prior lien on said lands. They offer to redeem from said tax sale, and ask to be permitted to do so, and that the deeds be set aside. The district court entered a decree for plaintiffs for the amount due on the Grimes note; for L. L. Seerley for the several amounts due on her notes and mortgages; and adjudged that J. J. Seerley had valid tax deeds to some of the ⁴⁰⁸ real estate covered by the Grimes and L. L. Seerley mortgages, and that said mortgages were not liens upon

said lands. As to other lands covered by the Grimes mortgage (not including the three-sevenths acquired by Prindle after it was executed), a decree of foreclosure was entered. The L. L. Seerley mortgages were also foreclosed as to certain lands. It was held that the renewal by the Prindles of the note to Grimes was void as to Lukenbill and Sackrison, and a foreclosure of the Grimes mortgage as to that forty acres was refused. Plaintiffs were adjudged to pay the costs.

2. Upon the foregoing facts, the following questions are to be determined: 1. As to the alleged agreement for a reduction of interest on the Grimes note and mortgage; 2. Whether the showing is such as to justify the decree below, finding that the Grimes mortgage erroneously embraced the entire title to the land described therein, when it should have conveyed only four-sevenths of it; 3. Whether plaintiffs' contention touching Seerley's tax titles is supported by the evidence; 4. Whether Lukenbill and Sackrison can successfully plead the statutes of limitation as against the lien of the Grimes mortgage on the forty acres conveyed by the Prindles to Lukenbill, and by him to Sackrison.

There is no evidence establishing the alleged agreement for a reduction of the interest on the mortgage debt of the Prindles to Grimes; therefore, judgment was properly rendered in plaintiff's favor for the amount due on the Prindle note to Grimes.

The evidence established the fact that it was the intention of the parties, in executing the mortgage to Grimes, to have it cover only four-sevenths of the land therein described, it being, also, the interest then in fact owned by the mortgagors. It is certain that, by some oversight or mistake, the ⁴⁰⁰ mortgage was so written as to embrace a full title to the land described, rather than the four-sevenths, as intended. Plaintiffs insist, however, that the defendants are now barred from having a reformation of the mortgage in this respect. If this be true, it is no reason for giving plaintiffs a greater interest under the mortgage than the mortgagors possessed, and especially so when it appears that there was no intent to convey an interest greater than that then owned by the mortgagors. A. H. Prindle, one of the mortgagors, some time after the execution of the mortgage to Grimes, acquired title to the other three-sevenths interest in this land, and plaintiffs insist that this after-acquired interest inures to their benefits. Code, section 1931, provides: "Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee." This statute

applies to mortgages where there are no intervening equities: *Rice v. Kelso*, 57 Iowa, 115. Here we have a case where the mortgage, by mistake, conveyed a greater interest than the mortgagors possessed. The consideration was not based upon an interest in the property to be thereafter acquired. The entire arrangement between the parties was, as we have found, grounded upon the belief and intention to mortgage the undivided four-sevenths of the land. No other or greater interest was considered, but, by oversight, the entire interest was pledged for the debt. Now, manifestly, the statute was never intended to apply to a case where the grantee or mortgagee never had in contemplation or expectation the acquiring of any other or greater interest in the property than that then owned by the grantor or mortgagor, and when, by oversight or mistake, such greater interest was ⁴⁷⁰ embraced within the terms of the instrument. The court below properly held that plaintiffs were not entitled to a lien as against the after-acquired three-sevenths interest in the land.

3. As to the tax title of Seerley: The gist of plaintiffs' complaint touching defendant Seerley's tax title is thus set forth in paragraph 6 of the amendment to their petition: "Plaintiffs charge the truth to be that said John J. Seerley procured said tax titles in carrying out an understanding had and agreed upon between himself and his said clients, that he should procure said titles in his name, or under his control, but in secret trust for the use and benefit of his said clients, and wrongfully and fraudulently used said titles to defeat the plaintiffs' prior lien on said lands; and that said tax titles are held by said Seerley, not for himself, but in trust for the use and benefit of his said clients." Counsel for appellants has, with great force and ability, argued the question as to the validity of these tax titles. We have examined the matter with care, and reach the conclusion that there was nothing in Seerley's relation to the parties which should have precluded him, under the circumstances disclosed, from acquiring the tax titles. We cannot consider the evidence in detail, but may properly say that when these titles were acquired, neither he nor his partner, Clark, was an attorney for the Prindles. The purchase at the tax sale was not made for the Prindles, or for any other client, and Seerley acquired the certificates for himself only. He held them until the period of redemption had expired. After this suit was commenced, and, no redemption having been made, he took his deed. The evidence falls far short of establishing any agreement, understanding, fraud, or trust, as is alleged by plaintiffs. Grimes died after this suit was commenced. He had ample opportunity to know the condition

of this ⁴⁷¹ land and title. He made no attempt to ascertain the facts touching the tax sale, and, without inquiry or investigation, began this suit. The slightest diligence on his part would have disclosed the situation, and he could have redeemed from the sale, and thus protected his mortgage lien. We discover no reason for setting aside this tax title.

4. As to the defense of the statute of limitations: When Lukenhill acquired title to the forty acres, the mortgage to Grimes was of record, and, upon its face, in full force, and not barred. When he conveyed to Sackrison, said mortgage was barred, and had ceased to be a lien upon this land, unless it was continued as a lien by reason of the renewal of the debt which it secured. Sackrison took title to the land in ignorance of the indorsement which had before that time been made by the Prindles on the note to Grimes. If the indorsement upon the note was binding as to Sackrison, and effectual for the purpose of extending the lien upon the land which he had purchased at a time when the mortgage on its face was barred, then he cannot successfully plead the bar of the statute.

We have, then, the question as to whether or not a mortgagor, after he has parted with the title to land which is pledged for the security of a debt, may, by complying with the provisions of our statute, revive the debt, which is barred, so as to continue the lien of the mortgage in force as against one who purchased the land when the mortgage appeared to be barred, and without notice of the attempted revivor. In the former opinion, it was thought that this question was ruled by the case of *First Nat. Bank v. Woodman*, 23 Iowa, 668, 57 Am. St. Rep. 287. That, we think, was not a proper view of that case. *Clinton County v. Cox*, 37 Iowa, 570, was a case where plaintiff sought to foreclose a mortgage executed by ⁴⁷² Cox. Everhart purchased the land from Cox. Butterfield filed a cross-petition, alleging that Cox, on November 6, 1857, executed to him a deed of trust to secure certain notes, and that since June 1, 1865, said Cox had been a nonresident of the state. This cross-petition prayed for the foreclosure of the deed of trust against the land. Everhart, the purchaser of the land, demurred to the cross-petition, on the ground that the cause of action was barred by the statute of limitations. The demurrer being sustained, Butterfield appealed. It was held that the nonresidence of the debtor, Cox, arrested the operation of the statute, and that the remedy upon the indebtedness still existed, and the lien might be enforced to satisfy the debt. *Mahon v. Cooley*, 36 Iowa, 479, involved the question of the power of a husband, by reviving the cause of action without the concurrence of the wife, to keep alive the

lien of a mortgage on the homestead, and which secured the debt, after the period of limitation had expired. It was held that he could do so. *Brown v. Rockhold*, 49 Iowa, 284, involved the same question as did *Clinton County v. Cox*, 37 Iowa, 570, and the holding was the same. In *Kerndt v. Porterfield*, 56 Iowa, 412, the facts were that the note and mortgage were executed October 20, 1865, and due in three years. Before they were barred, Porterfield executed other notes, secured by a mortgage on the same property, to one Howard. After the original debt was barred, and after Howard took his notes and mortgage, Porterfield revived the debt. It was held that the new promise revived the mortgage as against Howard, the junior mortgagee. In *Palmer v. Butler*, 36 Iowa, 581, the question was as to the effect of a revivor by a mortgagor which was made prior to the purchase of the land by another, and it was held that such revivor continued the lien as against the purchaser. In *Day v. Baldwin*, ⁴⁷³ 34 Iowa, 384, it was held that one who purchases the interest of the owner of the land may set up the bar of the statute. In *Palmer v. Butler*, 36 Iowa, 581, it is said: "It has been held by this court that a new promise to pay a debt barred by the statute, made by the mortgagor after he had conveyed the mortgaged premises, will not revive the right of action for foreclosure against the grantee of the mortgagor, but that such grantee may protect himself against the foreclosure by pleading the statute, notwithstanding the new promise of the mortgagor: *Day v. Baldwin*, 34 Iowa, 380." In *Kerndt v. Porterfield*, 56 Iowa, 412, it is said: "It may be, but the point we do not decide, that one acquiring an interest in the mortgaged property after foreclosure of the mortgage is barred by the statute, and, before a new promise is made, would hold by a right superior to the mortgagee, after his debt is revived by a new promise. But the case is different where one acquires such an interest before the action upon the mortgage is barred, and, after the period of limitation has run, the debt is revived by a new promise." In *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St. Rep. 287, it was held that: "In the absence of controlling equities, a second mortgagee, when a prior mortgage is uncanceled, must take notice of the fact whether or not the cause of action thereon has been revived." The question involved in that case, the right of a subsequent mortgagee to avail himself of the statute as against a claim apparently barred, is not the question we have to deal with. We have a case where one purchased the mortgaged premises at a time when the debt, as appeared from the mortgage, was barred, and without any notice that, after his grantor

purchased the premises, the mortgagors had, by written promise, undertaken to revive the debt. We do not think that there is any decision of this court which has determined this question against the ⁴⁷⁴ conclusion reached by the lower court. The doctrine of *Day v. Baldwin*, 34 Iowa, 384, which we have shown has been recognized in at least two subsequent cases, is in harmony with the thought that one who purchases the mortgaged real estate at a time when the mortgage appears to be barred, may successfully interpose a plea of the statute of limitations to the foreclosure of such a mortgage, which the mortgagors have attempted to revive after they have parted with their title, he having no notice of said revivor. We are not disposed to extend the doctrine of *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St. Rep. 287, to a case where the facts are like those at bar. We are aware that this court has often said that the lien of the mortgage will continue so long as the debt exists; and, as a rule, that is so, but the language thus used is to be construed in view of the facts then under consideration.

There is no doubt of the right of the mortgagors in this case to revive the debt as against themselves, or so as to continue the lien as against property which was embraced within the mortgage, and which they then owned; but, as to the land in question, which they had sold long before the attempted revivor, and the title to which was acquired by Sackrison in reliance on the fact that the debt, as evidenced by the mortgage, was barred, and, without notice of the revivor, there can be no such revivor. The law is well settled that, after the mortgagor disposes of the mortgaged premises by deed, he loses all control over them. He is then powerless to create or revive charges against such lands. As is often said as to such premises he is a stranger, and his power to revive a mortgage does not exist if, under the circumstances, he has not power to give a new one which would be binding thereon: *Zoll v. Carnahan*, 83 Mo. 43; *Lord v. Morris*, 18 Cal. 482; *Schmucker v. Sibert*, 18 Kan. 104; 26 Am. Rep. 765; *Newbould v. Smith*, ⁴⁷⁵ L. R. 33 Ch. Div. 127; *Wood v. Goodfellow*, 43 Cal. 185; 13 Am. & Eng. Ency. of Law, 761.

The decree of the district court is in all respects correct, and it is affirmed.

MORTGAGE—WHEN COVERS AFTER-ACQUIRED TITLE.—At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage and then actually belonging to the mortgagor: Monographic note to *Moody v. Wright*, 46 Am. Dec. 712. In California, by statute, title subsequently acquired by the mortgagor inures to the benefit of his mortgagee, as much so as if that title had been originally possessed by him: *Clark*

v. Baker, 14 Cal. 612; 76 Am. Dec. 449, and note; Kirkaldie v. Larabee, 31 Cal. 455; 89 Am. Dec. 205, and note. See, also, upon the general subject, notes to Patapsco Guano Co. v. Ballard, 54 Am. St. Rep. 139; Trull v. Eastman, 37 Am. Dec. 129.

MORTGAGES—STATUTE OF LIMITATIONS—NEW PROMISE. If a mortgage, an action on which is apparently barred by the statute of limitations, remains uncanceled of record, and has actually been revived by a new promise, the lien of such mortgage, in the absence of equities to the contrary, is superior to subsequent mortgages on the same property to secure antecedent debts: First Nat. Bank v. Woodman, 93 Iowa, 668; 57 Am. St. Rep. 287, and note.

LESSELL v. GOODMAN.

[97 Iowa, 681.]

HOMESTEAD, INTEREST OR TITLE WHICH MAY BE SUBJECT TO.—Real property held under a contract of purchase, the vendor retaining the legal title, may be the subject of a homestead claim on the part of the purchaser and his wife.

HOMESTEAD.—AN ACKNOWLEDGMENT BY A HUSBAND that he has forfeited his contract to purchase land held as a homestead, in which acknowledgment his wife did not join, is void.

FORFEITURE, WAIVER OF.—If the vendor of land on which the purchaser or his wife has filed a homestead, by his acts or statements, leads her to believe that he will not insist upon the strict terms of the contract of sale as to payments, he will not afterward be permitted to insist that a forfeiture has occurred by reason of the payments not being made at the time agreed upon.

Action to quiet title brought by the plaintiff against Joseph Goodman and his wife. The property which was the subject of the action was, on July 15, 1892, sold by the plaintiff to the defendant Joseph Goodman for the sum of one hundred and seventy-five dollars, of which ten dollars were paid down, and the balance was to be paid in sums designated on July 15, 1893, and on July 15, 1894. The contract of sale was in writing, and purported to make time the essence of it, and provided that if any default should be made in any of the payments, all rights of the purchaser thereunder should at once cease and determine. The purchaser entered upon possession of the property with his family, and occupied it as a homestead. Shortly before the maturity of the second payment, the purchaser abandoned his wife, and thereafter lived separately from her. She, as a defense to the action, claimed that plaintiff had waived the forfeiture, and she tendered to him the full amount due on the contract and pleaded her readiness to perform, and asked that on payment of the balance due, the plaintiff be compelled to execute to her a conveyance of the real property. A decree was entered as prayed for by the wife, and the plaintiff thereupon appealed.

Shortley & Harpel, for the appellant.

H. A. Hoyt and White & Clark, for the appellee.

KINNE, J. 1. It is contended that Mrs. Goodman has no right of homestead in this lot. In *Pelan v. De Bevard*, 13 Iowa, 53, it was held that a homestead might exist in a leasehold estate. The court said that the exemption provided by statute "is not limited to any particular estate, either as to its duration or extent." And in *Stinson v. Richardson*, 44 Iowa, 373, it was held that the fact that a vendor retained the legal title as security for unpaid purchase money would not operate to defeat the vendee's claim of homestead in the property. The interest acquired by the husband in this case was such that the homestead right attached. Such being the case, no conveyance of it by the husband alone would be of any validity: Code, sec. 1990. An assignment of a lease, by the husband alone, of premises occupied as a homestead, is not valid: *Pelan v. De Bevard*, 13 Iowa, 53. In the case at bar, the husband, after plaintiff had declared the contract forfeited, in writing, undertook to acknowledge said forfeiture as valid and binding. It is clear that, under the statute prohibiting the encumbrance or conveyance of the homestead, except by the joint act in writing of both husband and wife, this attempted acknowledgment of the claimed forfeiture was void.

2. There is some conflict in the evidence as to whether or not the plaintiff waived his right to insist upon a forfeiture under his contract. We think, however, he, by his acts and statements, fairly led the wife to believe that he would not insist upon the strict terms of the contract as to payments. Therefore, he ought not now be permitted to insist that, by reason of the payments not being made at the time agreed upon, all rights of the parties thereunder were forfeited. We conclude that plaintiff waived the right of forfeiture provided for in the contract. The tender was sufficient, and the decree below is affirmed.

HOMESTEAD—WHAT INTEREST OR TITLE MAY BE SUBJECT TO.—One who holds the equitable title to land under a contract for the purchase thereof, may impress it with a homestead lien the same as if he held the estate in fee, except that it is subject to the claim of the vendor for the unpaid purchase money: *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158, and note. See *Perry v. Ross*, 104 Cal. 15; 43 Am. St. Rep. 66, and note. A party having naked possession only of a tract of land may acquire a homestead right therein as to everybody but the true owner: *Spencer v. Geissmann*, 37 Cal. 96; 99 Am. Dec. 248.

HOMESTEAD—LAND UNDER CONTRACT TO PURCHASE—RIGHTS OF WIFE.—Where a wife files a declaration of homestead upon land held as community property by her husband under a con-

tract of purchase, he cannot, by any act in which she does not join, transfer such contract so as to defeat the homestead claim: *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—FORFEITURE.—Where a party entitled to a forfeiture waives or acquiesces in the forfeiture, he will be precluded in equity from enforcing it, and the defaulting party will be relieved: Monographic note to *Smith v. Mariner*, 68 Am. Dec. 85-87. As to what may constitute a waiver of a forfeiture provided for in a contract to sell land, see *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158.

KEARNEY MILLING AND ELEVATOR COMPANY v. UNION PACIFIC RAILWAY COMPANY.

[97 IOWA, 719.]

ELECTION BETWEEN REMEDIES, WHEN IRREVOCABLE.—A man may not take two contradictory positions and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him from going back and electing again.

ELECTION.—A CONTRACT OF SALE OBTAINED BY FRAUD is not void, but voidable, and the contract continues until the party defrauded has determined his election by avoiding it, and, when once rightfully determined, it is determined forever, and the bringing of an action to recover the property sold is such an election.

AN ELECTION TO RESCIND A CONTRACT WAIVES the right to sue upon it.

AN ELECTION TO RESCIND A SALE FOR FRAUD HAVING BEEN MADE BY SUING TO RECOVER POSSESSION of the property, the vendor cannot afterward exercise or claim the right of stoppage in transitu. The exercise of the right of stoppage in transitu does not operate to rescind a sale. But the vendee still has the right to take the goods on payment of the purchase price.

ELECTION OF REMEDIES ON THE PART OF A VENDOR, WHAT IS AND WHEN IRREVOCABLE.—If an action is brought by vendors of goods by the complaint in which they allege themselves to be the absolute owners of the goods, and they thereupon recover possession of and sell them as their own without giving any notice to their vendees, and the plaintiffs afterward amend their complaint by alleging that they had sold the goods and delivered possession to the purchasers, who had shipped them by a common carrier, and they, the plaintiffs, had exercised the right of stoppage in transitu, the complaint as first filed must be deemed an irrevocable election to rescind the sale, and the plaintiffs cannot afterward exercise the right of stoppage in transitu; and if, before such election to rescind was made, the purchaser indorsed the bills of lading to a third person for a valuable consideration, his title is superior to that of the vendors who have thus elected to rescind.

RESCINDING SALE FOR FRAUDULENT PURPOSE OF VENDEE NOT TO PAY.—If goods are sold on credit, and the vendee has a secret intention not to pay for them, the vendor, on discovering that intention, has the right to rescind the sale, though the goods have passed into the possession of the purchaser.

Two actions to recover possession of grain. In each action the Citizens' State Bank, intervenor, claimed to be the owner of the property. The court, on motion, directed a verdict for the intervenor in each case, and such verdict having been returned and judgment thereupon entered against the plaintiffs, they appealed.

Sims & Bainbridge, for the appellants.

Hart & McCabe, for the appellees.

⁷²⁰ ROBINSON, J. In November, 1891, the Brown Brothers Grain Company, a corporation, was engaged in the business of buying and shipping grain, and had its principal places of business at Council Bluffs and Omaha. About the twelfth day of that month, the plaintiffs sold to the company several carloads of wheat and rye. The grain so sold was delivered to the Union Pacific Railway Company, at stations in Nebraska, to be transported to Council Bluffs, and there delivered to the purchaser. Bills of lading, in which the grain company was named as consignee, were issued by the railway company and delivered to the plaintiffs. They were forwarded by mail to the consignee, and drafts on it for the price of the grain were drawn, and forwarded through banks for collection. The bills of lading were delivered by the consignee to the intervenor in exchange for other bills of lading, to be held as collateral security for the payment of two promissory notes, made by the consignee to the intervenor, for the aggregate sum of twelve thousand dollars. The drafts drawn by the plaintiffs were not paid, and on or about the eighteenth day of November, learning that the grain company was insolvent, and that the grain was still in the cars and in the actual possession of the railway company, the plaintiffs notified it not to deliver the grain to the consignee. A few days later these actions were commenced. The grain was obtained by means of them, and sold by the plaintiffs without any notice of any kind to the grain company, ⁷²¹ or to the intervenor. The first petition filed in each case alleged that the plaintiff therein named was the absolute and unqualified owner of the property sought to be recovered. In January, 1892, the intervenor filed a petition of intervention in each case, alleging that it was entitled to the grain in controversy, to be held as collateral security for the payment of the indebtedness, on account of which the bills of lading had been delivered to it. In February, 1893, the plaintiffs filed to the petition of intervention their answer, in which they alleged that before the grain reached Council Bluffs they learned that the consignee was insolvent, and was disposing of its property for the purpose of defrauding its creditors, and was intending to

get possession of the grain, if possible, and transfer it, with the intent to cheat and defraud the plaintiffs out of the purchase price; that the plaintiffs elected to rescind the sale by stopping the grain in transitu; and that they did so stop it, and obtained possession of it by the process of replevin. In December of the same year the plaintiffs filed amended and substituted answers, in which were set out more fully the matters pleaded in the original answers. In February, 1894, the plaintiffs filed amended and substituted petitions, in which they alleged the sale of the grain in question to the grain company; that while the grain was in transit they learned that the purchaser was insolvent and unable to pay for the grain, and that thereupon they notified the railway company not to deliver the grain to the consignee, and elected to stop it and regain possession of it, for the purpose of asserting and regaining their lien thereon for the unpaid purchase price; that the consignee was, in fact, insolvent, and unable to pay for the grain, but that the plaintiffs had no knowledge of the insolvency and inability to pay for the grain until after it had been shipped; that by reason of the facts stated, the ~~722~~ plaintiffs became entitled to the immediate possession of the grain. At the same time they filed second substituted answers to the petition of intervention, and filed amendments thereto a few days later. In these the most of the statements of the first and second answers are repeated in substance; and it is alleged, further, that the intervenor had full knowledge of the condition and fraudulent intent of the grain company, and received the bills of lading to aid it in delaying, hindering, and defrauding its creditors, and that the transfer of the bills of lading to the intervenor was without consideration. The averments of the substituted petition in regard to the election of the plaintiffs to stop the grain in transit, for the purpose of securing the payment of the purchase price, are, in substance, repeated, and a lien upon the grain, paramount to any right thereto of the intervenor, is alleged. In its replies to the final answers to the petition of intervention, the intervenor alleges that, for reasons stated, the plaintiffs are estopped to assert any right to or interest in the grain adverse to it; that they elected to and did rescind the contract of sale, and cannot now assert a lien on the grain by virtue of a stoppage in transitu. The motion for a verdict in each case was based upon two grounds, of which the first was, in substance, that the plaintiffs had elected to rescind the sale, and therefore could not enforce a lien for the purchase price; and the second was that the title acquired by the intervenor through the transfer of the bills of lading had not been impeached. The

claim of the appellee in regard to the matters included in the first ground of the motion are that the plaintiffs, as against the grain company, had the right to select either of two remedies, to wit: 1. To rescind the contract of sale, and recover the grain as its absolute and unqualified owner; or 2. To stop the grain in transit, and enforce their vendors' lien for the purchase ⁷²³ price. It is further claimed that these remedies are so inconsistent that an election to pursue one terminates the right to resort to the other, and that the plaintiffs made an irrevocable election to rescind the sale; therefore, that they cannot enforce a vendor's lien in this action. The appellants deny that they had a choice of remedies, and insist that the changes in their claims of interest in the property were permissible under their right to amend the pleadings.

1. The rule in regard to the election of remedies is stated in *Thompson v. Howard*, 31 Mich. 312, as follows: "A man may not take two contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election, in the case of conflicting and inconsistent remedies": *Washburn v. Great Western Ins. Co.*, 114 Mass. 175; *Sanger v. Wood*, 3 Johns. Ch. 421; *Rodermund v. Clark*, 46 N. Y. 354; *Sloan v. Holcomb*, 29 Mich. 160; *Crompton v. Beach*, 62 Conn. 25; 36 Am. St. Rep. 323; *Crook v. First Nat. Bank*, 83 Wis. 31; 35 Am. St. Rep. 17; *O'Donald v. Constant*, 82 Ind. 213; *Bishop on Contracts*, secs. 678-680, 683; 6 Am. & Eng. Ency. of Law, 250; *Heinze v. Marx*, 4 Tex. Civ. App. 599; *Thomas v. Joslin*, 36 Minn. 1; 1 Am. St. Rep. 624; *Morris v. Rexford*, 18 N. Y. 552. In *Connihan v. Thompson*, 111 Mass. 272, it was said: "The defense of waiver by election arises when the remedies are inconsistent, as where one action is founded on an affirmance, and the other ⁷²⁴ on a disaffirmance, of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the fact, determines the legal rights of the parties once for all." Where a vendor elects to rescind the sale of goods on the ground of a fraud, and recovers possession of them by an act of replevin, he cannot afterward, on failing to obtain adequate relief in that action, claim of the assignee of the insolvent purchaser as for goods sold. One theory is totally

at variance with the other. "If one elects between two inconsistent remedies, the right to pursue the other is forever lost": *Farwell v. Myers*, 59 Mich. 179. A contract of sale obtained by fraud is not void, but voidable, and the contract "continues until the party defrauded has determined his election by avoiding it, and, when once rightfully determined, it is determined forever"; and the bringing of an action to recover the property sold is such an election: *Powers v. Benedict*, 88 N. Y. 606. A party cannot both affirm and rescind a contract, and the commencement of an action, with full knowledge of the facts, is an election which is final, and the discontinuance of the action is immaterial. "When it becomes necessary to choose between inconsistent rights and remedies, the election will be final and cannot be reconsidered, even when no injury has been done by the choice, or would result from setting it aside": *Terry v. Munger*, 121 N. Y. 161; 18 Am. St. Rep. 803; 2 Hermann on Estoppel, secs. 1045-1051. In *Bulkley v. Morgan*, 46 Conn. 393, it appeared that one Brennan had purchased goods of the plaintiff by fraud, which would have authorized him to rescind the sale and reclaim the goods. With knowledge of the fraud, he commenced an action for the value of the goods, and attached them to secure his claim. He afterward discovered that his action was prematurely brought, and dismissed it, and then brought an action ⁷²⁵ of trover for the goods. It was held that he had affirmed the contract, with full knowledge of all the facts, and could not afterward rescind it: See, also, *Acer v. Hotchkiss*, 97 N. Y. 395. If an agent for the purchase of stock exceed his authority, his principal may ratify his act; and any expression of assent on his part, either by words, or conduct, would bind him, "not on the principle of estoppel, but as in other cases of election": *Metcalf v. Williams*, 144 Mass. 452. "Where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn, though it has not been acted upon by another by any change of position": *Bigelow on Estoppel*, 673. "The defrauded party to a contract has but one election to rescind the same. If he once determines his election, it is determined forever. Hence, if it be shown that he has at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election is irrevocable": *Bigelow on Fraud*, 436. "Ratification or election, once made, expressly or impliedly, is irrevocable, and binds not only the party but all claiming under him": Hermann on Estoppel, sec. 1065.

It was said in *Pence v. Langdon*, 99 U. S. 578, in regard to a fraudulent sale of shares of stock: "The election to rescind or not to rescind, once made, is final and conclusive." The election to rescind waives the right to sue on the contract: *Tiffany on Sales*, 120, 121. "A statement in a plea, by the party from whom the property passed, that he claims back the property, on the ground that he was induced to part with it by fraud, is as unequivocal a determination of his election to avoid the transaction as could well be made. . . . After succeeding by means of such a plea, ⁷²⁶ the person pleading it could never successfully set up the contract as still valid": *Clough v. Railway Co.*, L. R. 7 Ex. 36. The assignee in bankruptcy of a person who made a fraudulent conveyance of property "has an election, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other." The assignee may demand the property on the ground that the sale was void, or he may demand the price, but he cannot do both. If he commence an action for the price, and cause the property of the purchaser to be attached to secure it, this is an unequivocal assertion that the sale is not impeached, and, if done with knowledge of the facts, is conclusive: *Butler v. Hildreth*, 5 Met. 49. The rule we have been considering is not confined to contracts for the sale of property, but is of general application. Thus, a party holding personal property by virtue of a mortgage or pledge may waive his claim under the mortgage or pledge, and attach the property in a suit to recover the debt for which the mortgage or pledge was given. Such an attachment is in itself a waiver of the claim under the mortgage or pledge. The lien created by the latter is essentially different from that created by the attachment, and the two cannot exist at the same time: *Evans v. Warren*, 122 Mass. 303. See, also *Whitaker v. Sumner*, 20 Pick. 404; *Wingard v. Banning*, 39 Cal. 543; *Libby v. Cushman*, 29 Me. 429; *Jacobs v. Latour*, 5 Bing. 130; *Sensenbrenner v. Mathews*, 48 Wis. 250; 33 Am. St. Rep. 809. The commencement of an action to enforce a lien on certain machinery, although the action was dismissed by the plaintiffs without a trial, on the merits, was inconsistent with their ownership of the property, and was an election to treat the title as not in them: *Van Winkle v. Crowell*, 146 U. S. 42; *Lehman v. Van Winkle* (Ala., Feb. 12, 1891), 8 So. Rep. 870. Where the owner of land sues for the value of timber taken ⁷²⁷ therefrom, he cannot afterward maintain an action for the conversion of the timber, even though the court in which the first action was brought did not have jurisdiction of the defendant in that action: *Nield v. Burton*, 49 Mich. 53. The decisions of this court

are in harmony with the authorities cited: *Klocow v. Patten*, 93 Iowa, 432; *Schneitman v. Noble*, 75 Iowa, 121; 9 Am. St. Rep. 467; *Citizens' Bank v. Dows*, 68 Iowa, 460.

It is clear, under the rules of the cases we have been considering, that if the right to elect existed, the action of the plaintiffs in taking the grain in controversy and selling it, under a claim of absolute ownership, with full knowledge of all the material facts, was an election of rights and remedies which was final and conclusive. The claim under which these actions were commenced in November, 1891, was that the plaintiffs were the absolute and unqualified owners of the grain. Taking possession of it, and acting on that claim, they sold it forthwith as their own, and did not modify their claim of ownership until February, 1894, when the amended and substituted petitions were filed. It is not averred in the pleadings as amended, nor is it shown by the evidence, that the claim of absolute ownership was made under any mistake. So far as we are informed, it was made with full knowledge of all material facts, and it necessarily involved the conclusion that the contract of sale had been rescinded. The grain was sold as the property of the plaintiffs, without notice of any kind to the grain company or to the intervenor. It is true the right to sell may not have depended upon the giving of notice. But it is the better practice for the vendor who exercises the right of stoppage in transitu to give a notice of an intention to resell the goods, when it is practicable to do so: *Holland v. Rea*, 48 Mich. 218; *Van Brocklen v. Smeallie*, 728 140 N. Y. 75; *Ullmann v. Kent*, 60 Ill. 271; *Saladin v. Mitchell*, 45 Ill. 85; *Hickock v. Hoyt*, 33 Conn. 558; *Brownlee v. Bolton*, 44 Mich. 218; *Benjamin on Sales*, Bennet's 6th ed., 775; *Tiffany on Sales*, 228. And the fact that such notice is not given, if unexplained, tends to show an intention to rescind the sale: *Redmond v. Smock*, 28 Ind. 370. According to the weight of authority, the mere exercise of the right of stoppage in transitu does not operate to rescind the sale; but that conclusion is for the benefit of the vendor, as it may be to his advantage to resell the goods, under proper conditions, and hold the vendee for the loss, if any, sustained by his failure to perform the contract. But until the sale is rescinded, the vendee, or his assignee, has the right to take the goods on payment of the contract price; and, if the vendor does not then deliver them, he is responsible for the damages which result from his failure to do so: *Diem v. Koblitz*, 49 Ohio St. 41; 34 Am. St. Rep. 531. But when the vendor rescinds the contract of sale the right of the vendee to the goods sold is at an end. The rights and liabilities of the parties to a contract of sale which has been re-

scinded are entirely different from those which exist where the right of stoppage in transitu, only, is exercised. From November, 1891, until February, 1894, the plaintiffs asserted, in effect, by their pleadings and by their conduct, that the contract of sale had been rescinded, and prevented the grain company and the intervenor from paying the contract price and taking the grain, had they desired to do so. Certainly, this was conclusive evidence of rescission, so far as it could be effected. But it is said that the relief which the plaintiffs have at all times sought was obtainable by an action for the recovery of the grain, and that it was within their right to modify their claim as to their interest in the grain by ⁷²⁹ amending their pleadings at any time before the trial. Their right to amend is not disputed, but the effect of the amendment is another matter. The fact that the property in question might have been recovered by an action of replevin, whether the plaintiffs were the absolute owners of the property, or were merely entitled to the possession of it for the purpose of enforcing a lien, is not decisive of their right to recover, even if the averments of the pleadings as amended be sustained. The controlling considerations are, that with knowledge of the facts, they elected to rescind the contract of sale, and acted upon that election, and that their subsequent attempt to revive the contract, and treat it as in force, is wholly inconsistent with the election as first made. They sought to recover the property in each case, it is true, but in the first case on the ground that they had not sold it, and in the other on the ground that they had sold it, and were entitled to it, as a means of securing payment of the price. As we have seen, they cannot affirm the contract, after having elected to disaffirm it.

2. The appellants deny that they had a choice of remedies, and insist that the facts set out in their pleadings did not show that they were entitled to rescind the sale, but only to stop the grain in transit for the purpose of enforcing against it their demands for the unpaid purchase price. It may well be questioned whether the plaintiffs, after having derived all possible benefits from their election to rescind, should be permitted to avoid the effects of their election on the ground that what they did was in violation of law. But we do not find it necessary to determine that question. Ordinarily, the effect of the exercise of the right of stoppage in transitu is to vest in each party to the contract of sale the rights he had before the possession of the goods sold was delivered to the carrier: *Cox v. Burns*, 1 Iowa, 68; *Babcock v. Bonnell*, 80 ⁷³⁰ N. Y. 244; *Tiffany on Sales*, 226; *Story on Sales*, sec. 320; 2 *Kent's Commentaries*, 540; 1 *Parsons on Con-*

tracts, 598; 23 Am. & Eng. Ency. of Law, 932. And it is, perhaps, true that the mere insolvency of the buyer will not authorize the seller, who has effected a stoppage in transitu, to rescind the sale: 2 Benjamin on Sales, secs. 1166-1299, note. It is also probably true, as a general rule, that the intent of the buyer, formed after the sale of the goods and their completed delivery to him, not to pay for them, would not be sufficient to authorize the seller to rescind the sale on the ground of fraud: *Starr v. Stevenson*, 91 Iowa, 684; *Burrill v. Stevens*, 73 Me. 400; 40 Am. Rep. 366; *Tiedeman on Sales*, sec. 170. But it is well settled that when goods are sold on credit, the seller has the right to rely on the presumption that the buyer intends to perform his obligations by paying for the goods; and, if the latter then has a secret intention not to make payment, that intent, and his failure to disclose it, will entitle the seller to rescind the sale and recover the goods, even though they have passed into the possession of the buyer: *Reid v. Cowduroy*, 79 Iowa, 169; 18 Am. St. Rep. 359, and cases cited therein; *Bughman v. Central Bank*, 159 Pa. St. 94; 2 *Pomeroy's Equity Jurisprudence*, sec. 906. In this case, the admitted facts show that the plaintiffs did not know of the insolvency of the grain company, nor of its contemplated fraud, when the sale was made; that the plaintiffs learned those facts while the grain was in transit; and that they then notified the carrier not to deliver the grain to the grain company, and recovered the actual possession of the grain. The question on this branch of the case which we are required to determine is, whether the plaintiffs had the right to rescind the contract of sale. We are of the opinion that they did have the right as against the grain company. If the company had been insolvent and unable to pay for the grain when the sale was made, and if ⁷³¹ it then had the intention not to pay for the grain, and if these facts had been concealed from the sellers until after the sale and delivery of the grain, it is clear that the plaintiffs could have rescinded the sale and recovered the grain. We think it logically follows that if such facts were discovered after the sale, but before the delivery, the seller could have refused to deliver the grain, and rescinded the sale. In the case as it is submitted to us, it appears that the plaintiffs rightfully prevented a delivery of the property and secured possession of it. When that had been done they knew that the buyer could not pay for the grain if it were delivered, and that it intended not to pay for it. We know of no rule of law which could compel the sellers to treat the contract of sale as in force, under such circumstances. Ordinarily, if a party to a contract is unable or refuses to proceed with it,

the other party may rescind it: Bishop on Contracts, sec. 827. If a contract of sale is not completed, by reason of the failure of the buyer to comply with his part of the agreement, the seller may treat the goods as still his property, and sue the buyer for damages: Tiedeman on Sales, sec. 333. In *Morris v. Rexford*, 18 N. Y. 552, it was said that "a vendor may reclaim his goods after a delivery upon a sale for immediate payment, if the vendee, on getting the property into his possession, refuses to make payment. If there be no terms of credit expressed or implied in the delivery, the delivery in such case is deemed to be conditional, and subject to revocation on the refusal or failure of the purchaser to pay the price": See, also, *Palmer v. Hand*, 13 Johns. 435; 7 Am. Dec. 392. In *Henry v. Vliet*, 36 Neb. 138, it was held that where goods were sold on condition that they were to be paid for on delivery, and they were delivered without payment being made, the seller could reclaim them. It is not necessary to go so far as do some of the cases cited to sustain ⁷⁸² the right of the appellants to rescind the sale. Time was not given for the payment of the grain in question, but it was to be paid for on the presentation of the drafts, which were presented for payment before the grain had reached its destination; and possession had been taken by the appellants before there had been any actual delivery to the buyer. They found themselves entitled to the possession of the grain, without liability to surrender it to the buyer, excepting under a contract of sale, which the buyer could not and would not perform on its part. Under the circumstances, the sellers were fully authorized to rescind the contract. Having done so, and sold the grain under a claim of absolute ownership, their election was final. On the trial of the case they relied upon an alleged right to a lien which was shown not to exist, and, as there was no material conflict in the evidence in regard to it, the motions for verdicts were properly sustained.

3. The questions we have determined are controlling, and it is unnecessary to consider other questions discussed. It is proper to say, however, that we incline strongly to the opinion that the result reached effects, substantially, justice between the parties. The plaintiffs might have secured their claims for the grain by sending the bills of lading, with the drafts drawn for the purchase price, to the banks for collection; but they failed to do so, and, by sending the bills of lading to the grain company, enabled it to exchange them for similar bills held by the intervenor as collateral security. There is nothing in the record which shows lack of good faith on the part of the intervenor. Its transactions with the grain company were in the ordinary course of business,

without knowledge of the fact that the price of the grain in question had not been paid. It may be that the ⁷³³ plaintiffs would have been entitled to recover, as against the intervenor, had there been no election to rescind; but, if so, it would have been on technical grounds. For the reasons shown, we are satisfied with the judgment of the district court, and it is affirmed.

ACTIONS—ELECTION BETWEEN INCONSISTENT REMEDIES—WHEN IRREVOCABLE.—When one has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him and precludes him from subsequently pursuing the other right or remedy: *Crook v. First Nat. Bank*, 83 Wis. 31; 35 Am. St. Rep. 31, and note; extended note to *Thomas v. Joslin*, 1 Am. St. Rep. 626-629. For a thorough discussion of the subject, see the monographic note to *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 487-494. That such an election is not irrevocable until the elected remedy is pursued to final judgment, in the absence of intervening rights, see *Johnson-Brinkman etc. Co. v. Railway Co.*, 126 Mo. 344; 47 Am. St. Rep. 675, and note.

SALES—INTENTION OF BUYER NOT TO PAY—RESCISSION. When a sale of goods is made in which fraud arises from the intention of the purchaser not to pay for the goods, the sale is voidable only, not absolutely void: *Union etc. Co. v. Mallory etc. Co.*, 157 Ill. 554; 48 Am. St. Rep. 341. Such a fraud enables the seller to rescind the sale, although there were no false representations or pretenses: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90, and note; *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; unless the property has passed to the possession of a bona fide holder for value: *Nichols v. Michael*, 23 N. Y. 264; 80 Am. Dec. 259, and note. See monographic note to *Thurston v. Blanchard*, 33 Am. Dec. 708-710.

CASES
IN THE
SUPREME COURT
OF
KENTUCKY.

BEMENT v. OHIO VALLEY BANKING AND TRUST Co.

[99 KENTUCKY, 109.]

GIFT, WHEN REVOKED AND CANCELED.—If a father assigns certain indebtedness to his son without any valuable consideration, and, as the result of the subsequent compromise of an action between the debtor and the father, lands are conveyed to the son, who, on his part, agrees to pay such indebtedness to the father, this shows that the former transaction was no longer treated by the parties thereto as a gift, and that the son is liable to the father for the amount agreed to be paid to him.

LIMITATION.—A GIFT BY WHICH ONE PERSON stipulates to pay to another a debt due to the latter from a third person continues to be a subsisting liability, under the statutes of Kentucky, for fifteen years.

GIFT OR VOLUNTARY TRANSFER, WHEN NOT VALID AS AGAINST CREDITORS.—A release of indebtedness executed by a creditor to his debtor without consideration is not valid as against the creditors of the former.

VOLUNTARY TRANSFERS, WHO MAY ATTACK.—A holder of a covenant of warranty in a conveyance of land must be regarded as a creditor of the warrantor from the date of the deed, though it is not until several years afterward that there is a breach of the covenant. Hence, such covenantee may attack a voluntary conveyance made by his covenantor before the breach of the covenant.

RES JUDICATA, AVOIDING FOR FRAUD.—Though an administrator prosecutes a suit in equity for the settlement of his accounts and obtains a decree, it may be avoided by a creditor of the decedent on showing that such administrator fraudulently concealed property in his hands or debts due from him to the decedent of which the creditors of the latter had no knowledge. The rule of *res judicata* should not be applied in a subsequent controversy introducing new issues as to material, distinct matters which were not, either through the fraud of one party or the unavoidable casualty or misfortune of the other, presented and determined in the former suit.

H. F. Turner and Montgomery Merritt, for the appellant.

R. H. Cunningham and S. B. & R. D. Vance, for the appellee.

¹¹⁰ LEWIS, J. Joseph Adams, having died in 1884 intestate, his son, John C. Adams, was appointed administrator, and in 1885 brought an action in equity to settle the estate, against which, however, ¹¹¹ he set up individual demands, arising from alleged payment of debts as surety of decedent, greater in amount than assets reported.

In 1888, C. R. Bement, becoming on his petition a party defendant, filed an answer, made cross-petition against John C. Adams. In it he stated and also showed that, in 1880, Joseph Adams sold and by deed of warranty conveyed to him a tract of land, a dower estate in which, of value about six thousand five hundred dollars, E. S. Adams, his widow, sued for and recovered in 1885, and he had consequently a subsisting demand for that sum and interest against the estate of decedent. He further stated for cause of cross-action that John C. Adams did not have made and reported a true inventory and appraisement of the estate, but collected and converted to his own use proceeds of policies of insurance on the life of Joseph Adams, and also a government claim that rightfully belonged to the estate.

In defense, John C. Adams stated that the policies and government claim were given to him by his father, and that he was entitled to the whole proceeds thereof, without any deduction on that account from the amount of his demands against the estate.

Judgment was rendered in that action August 19, 1891, dismissing the cross-petition of Bement, though two thousand four hundred and forty-seven dollars of his demand was directed to be paid pro rata out of other assets in the hands of the administrator. That part of the judgment relating to the individual demands of John C. Adams is in these words: "It is adjudged that the gift by Joseph Adams, deceased, to plaintiff, John C. Adams, of the several policies of insurance, and the claim against the United States, were intended in part to indemnify him (said John C. Adams) against loss on any debt then owing, viz., at the ¹¹² gift and delivery of said policies and claim by said decedent to said John C. Adams, and any debts on which said John C. Adams was then bound as surety for said decedent; and, therefore, it is further adjudged that said John C. Adams shall not be allowed any claim against his decedent's estate for any such debt due to or paid by him." That judgment was, December 10, 1894, affirmed on appeal by John C. Adams and on cross-appeal by C. R. Bement.

August 21, 1891, Bement, having obtained a judgment against

John C. Adams, as administrator for residue of his demand, upon which was issued an execution returned no property found, brought the present action to subject certain real property claimed and held by John C. Adams, since deceased, in his own right.

The different parcels so held and claimed are alleged and appear to have been acquired under these circumstances:

1. August 23, 1881, Joseph Adams executed to him a mortgage on a debt he had against J. G. Adams, another son, for about three thousand dollars, besides other property, to indemnify him as surety in the Farmers' Bank, and to the First National Bank on debts therein described. Subsequently, Joseph Adams brought an action against J. G. Adams for judgment on the debt, obtaining and causing to be levied an attachment upon a tract of eighty acres of land. But October 2, 1884, that action was compromised, and for the recited consideration of two thousand one hundred dollars paid, and undertaking by the vendee to pay off and discharge the claim of Joseph against himself, J. G. Adams then conveyed to John C. Adams said tract of eighty acres. 2. June 1, 1882, Joseph Adams, for the recited consideration of twelve thousand dollars, which John C. and Robert G. Adams had paid and assumed to pay for him, sold and conveyed to them various lots or parcels of land described in the deed. ¹¹³ 3. In an amended petition, filed January 14, 1893, plaintiff stated that in March, 1891, Joseph Adams, having previously purchased from and paid the heirs of Charles Clay for a certain lot described, directed them to convey and they did convey it as a gift from him to John C. Adams. It is, however, alleged that if any part of the consideration for that transfer was valuable, it was so because intended to further indemnify John C. Adams, as surety.

The first ground of defense to the action we will consider is that of limitation. It appears that the indebtedness of J. G. to Joseph Adams was by open account, and, in order to avail himself of the statute limiting actions for relief for fraud to ten years, defendant alleged that the claim was January 23, 1881, without valuable consideration, given to him by his father and filed what purports to be a written assignment of it of that date. But that transaction was evidently not regarded by the parties, nor should be now treated as effectual for any purpose, because in 1884, on compromise of the action brought by Joseph Adams to recover on that identical claim and release of his attachment upon the tract of eighty acres, John C. Adams undertook and promised to pay to him the full amount thereof as part consideration of the

conveyance of said tract by J. G. Adams, and as it is plain Joseph Adams might, while living, have maintained an action on that promise, there is no reason why it is not now, nor why, being a written contract, it would not continue a subsisting liability of John C. Adams for fifteen years from 1884.

Defendant also pleaded and filed a written release from payment of any part of the consideration for the conveyance to him and Robert G. Adams, which Joseph Adams executed August 22, 1882. But, as that release was without any valuable ¹¹⁴ consideration and was executed within ten years prior to the commencement of this action, and manifestly was not, nor could with reasonable diligence have been, discovered by plaintiff until filed, the plea of limitation cannot as to it avail. It is, however, a confession that there was then an existing liability of John C. Adams to pay or account for one-half consideration of the conveyance by Joseph Adams to him and Robert G. Adams, and the amount of that indebtedness may, nothing to the contrary now appearing, be yet ascertained and subjected to pay creditors of decedent.

But it is argued that the covenant of Joseph Adams to warrant title and possession of the land conveyed to Bement in 1880 was not, until 1884, an existing liability in the meaning of the statute, and, consequently, the release then executed, although a gift without valuable consideration, was not void as to it. It seems to us such a position cannot be sustained without giving to the phrase "existing liabilities" a meaning more restricted than is reasonable or was intended by the legislature. We, however, regard the question settled by this court in *Garrard v. Garrard*, 7 Bush, 436.

It is not definitely stated or shown that John C. Adams incurred any liability to Joseph Adams on account of the conveyance by Clay's heirs, but the allegation is, the transaction was fraudulent, and, as it occurred more than ten years before the amended petition was filed, the plea of limitation must be sustained.

The main question is, whether the judgment rendered in the action to settle the estate of Joseph Adams is a bar to this.

Dismissal of the cross-action of Bement, we think, involved ¹¹⁵ a decision merely that the proceeds of the insurance policies and government claim were not subject to the demand of Bement, or, for that matter, of any other creditor of the estate, because they were, as said by the court, intended to indemnify John C. Adams against loss on any debt then owing to him by, or any debt on which he was surety of, Joseph Adams. But said pro-

ceeds appear to have amounted to as much as his individual demands, a list of which was filed, and consequently, it was at the same time adjudged none of the demands should be allowed.

The effect of that judgment was to offset the demands of John C. Adams with proceeds of the policies and government claim, and it does not in terms or meaning preclude Bement, or creditors generally, from subjecting other property of the estate in the hands of and improperly withheld by John C. Adams as administrator from cognizance of the court in that action.

But it is a rule often recognized by this court that a judgment of a court of competent jurisdiction is, in general, conclusive, not only as to all matters determined by it, but all incidental matters which might have been properly litigated and decided in the same suit; and as the property, which in this action it is alleged constituted part of the estate of Joseph Adams, and, therefore, subject to payment of debts against it, is a matter that might—indeed, ought to have been—litigated in the other action, the judgment in question, according to rigid application of that rule, is a bar to the relief now prayed for. But the rule being adopted by reason of necessity for some end to litigation, and because more injustice would generally result from reviving old issues than from limiting the right to prosecute actions, should not be applied where the new issues, being as to ¹¹⁶ material and distinct matters, were not, either through fraud of one party or unavoidable casualty or misfortune of the other, presented and determined in the former action.

As that action was instituted by John C. Adams in his fiducial character, and he had, by reason of personal connection with it, actual knowledge of the condition of the property now in litigation, it was his duty to then report it to court as part of the estate, or at least submit for decision of the court all questions properly relating to it. But having, instead, withheld it from the notice of the court to the prejudice of heirs and creditors, he should not now be allowed, in virtue of the rule in question, to profit by his own wrong. Clearly, his conduct would have entitled the present plaintiff to a new trial of the former action, if applied for in proper time, and we see no reason why the court may not now ascertain the amount of John C. Adams' indebtedness to the estate, and subject it to the debts of the creditors and distribute the surplus, if any.

The judgment is reversed and case remanded for proceedings consistent with this opinion.

GIFTS—WHEN REVOKED.—A gift made perfect by delivery and acceptance, and by a competent party is irrevocable: *Williamson v. Johnson*, 62 Vt. 378; 22 Am. St. Rep. 117. But nothing can take effect as an assignment or gift which does not manifest an intention to relinquish the right of dominion on one hand and to create it on the other: *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641; *Jones v. Weakley*, 99 Ala. 441; 42 Am. St. Rep. 84. And if anything remains for the donor to do before the title of the donee is complete in either gifts *inter vivos* or *causa mortis*, the donor may decline further performance, and resume his own: *Appeal of Walsh*, 122 Pa. St. 177; 9 Am. St. Rep. 83, and note. See *Simmons v. Cincinnati Sav. Soc.*, 31 Ohio St. 457; 27 Am. Rep. 521.

FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCES.—A voluntary conveyance made with the intent to hinder, delay, and defraud creditors is void as against subsequent, as well as prior, creditors, though the grantee did not know of, nor participate in, the fraudulent intent of the grantor: *Gilliland v. Jones*, 144 Ind. 662; 55 Am. St. Rep. 210, and note. A voluntary conveyance is presumed to be fraudulent and void as against existing creditors, and if the grantor is at the time insolvent and unable to pay his debts, the presumption is conclusive: *Rudy v. Austin*, 56 Ark. 73; 35 Am. St. Rep. 85, and note. See monographic note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 746.

FRAUDULENT CONVEYANCES—WHO MAY ATTACK AS CREDITORS.—The term "creditors" as employed in the statutes and decisions concerning fraudulent and voluntary conveyances is not used in any narrow or technical signification, but includes all persons whose interests might be defrauded by the transfer. The liability of a grantor under his covenant of warranty does not differ in principle from other contingent liabilities, and a fraudulent conveyance made at any time after such covenant ought to be regarded as void as against a judgment thereon: Monographic note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 743-745. See *Yeend v. Weeks*, 104 Ala. 331; 53 Am. St. Rep. 50; *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314.

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—RES JUDICATA.—A bill for the resettlement of the administration accounts of a decedent must be denied if the same matters were at issue and determined in a previous suit between the same parties: *Gibson v. Green*, 89 Va. 524; 37 Am. St. Rep. 888; extended note to *Picot v. Biddle*, 86 Am. Dec. 143. But where fraud has been practiced by an administrator in the settlement of his account, a court of equity will set aside the settlement and direct a new one in the probate court: *Green v. Creighton*, 10 Smedes & M. 159; 48 Am. Dec. 742, and extended note; *Mock v. Steele*, 34 Ala. 198; 73 Am. Dec. 455. See *Estate of Radovich*, 74 Cal. 536; 5 Am. St. Rep. 466.

MASON v COLUMBIA FINANCE AND TRUST COMPANY.

[99 KENTUCKY, 117.]

HOMESTEAD ON WHICH THE CLAIMANT HAS NEVER RESIDED.—If a husband and wife own adjacent tracts of land, which are cultivated as one farm, he may claim and hold his tract as a homestead, though the house in which he and his family reside is not upon his land, but upon hers.

C. C. Turner, A. T. Wood, and H. M. Woodford, for the appellant.

Stone & Sudduth, for the appellees.

118 PRYOR, C. J. The sole question to be determined on this appeal is, whether or not the appellant, John Mason, is entitled to a homestead in certain real estate conveyed by him to A. A. Hazlerigg for the benefit of creditors.

The appellant, Mason, and his wife owned jointly a tract of three hundred and twelve acres of land. The wife owned a part of the tract laid off and designated by metes and bounds in her own right, and the land owned by the husband adjoined the land of the wife, the entire body of land owned by husband and wife containing three hundred and twelve acres, and used and cultivated as one farm. The house in which they lived was on twenty-five acres of the land to which the wife had the fee, and the husband's land bordering upon it. The insolvency of the husband caused an assignment for creditors, and in the distribution of assets, his land having been sold, he was denied the right of homestead, or its value, and has appealed.

The case of *Vanmeter v. Vanmeter*, 12 Ky. Law Rep. 214, is relied on as sustaining the judgment below. In that case the husband assigned, having a right of curtesy in a tract of land of his wife, upon which he lived, worth more than one thousand dollars, and this court held he was not entitled to a homestead in both tracts. The land on which he lived or his life estate in it being worth one thousand dollars, and living upon it, he must take that and not his homestead in the tract to which he had the fee. It is insisted that to enable the appellant to assert his right he must have actually lived on the land to which he had the ¹¹⁹ fee, and this is the general doctrine on the subject, and often controls the decision of such questions. In this case, the appellant, in contemplation of the statute looking to both the letter and spirit of its provisions, was living on the land to which this right is asserted. It was all one tract, so regarded by the parties, used, cultivated, and claimed as one tract, and because the house is

outside of the boundary of the land to which the husband had the fee it is insisted no right of homestead exists.

The interpretation given the statute by this court is, "that it depends [this right] upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and that the right does not exist where the debtor and his family are permanently located elsewhere."

We think that looking to the purposes contemplated by the statute, that of securing to the debtor this exemption for himself and family, it cannot well be maintained that this residence on the one tract of land must be regarded as a permanent location, claimed for no other reason than that the home happened to be located on the land owned in fee by the wife.

In the case of *Lowell v. Shannon*, 60 Iowa, 713, it was held that where the husband and wife own contiguous tracts of land, and occupy the two tracts as a homestead, with the dwelling on the land of the wife, the wife was entitled to a homestead in the adjoining land of the husband. That the husband occupied this land sold for creditors as a homestead is, we think, unquestionable.

Judgment reversed, with directions to award the homestead in money, as the land has been sold, and direct its payment to the appellant.

Judge Hazelrigg not sitting.

HOMESTEAD—IMPORTANCE OF ACTUAL OCCUPANCY.—It is generally held that there must be both possession and occupancy of the premises in order to stamp them with the character of a homestead, but upon this question there is a decided conflict of authority: *Notes to Mann v. Corrington*, 57 Am. St. Rep. 261; *Cameron v. Gebhard*, 34 Am. St. Rep. 838; *Turner v. Turner*, 54 Am. St. Rep. 114; *Woodbury v. Warren*, 48 Am. St. Rep. 817.

BROOKS-WATERFIELD COMPANY v. FRISBIE.

[99 KENTUCKY, 125.]

HUSBAND AND WIFE, HIS CREDITORS' RIGHT TO HIS EARNINGS AND SERVICES.—If a married woman has property and a business of her own to which her husband contributes his time and labor, thereby improving it and otherwise increasing its productiveness or value, a court of equity will, at the instance of his creditors, inquire and determine what part of the property has thereby become equitably his, and will order such part, exclusive of the homestead and other exemptions, to be sold and applied to the payment of their claims, or will direct such property to be placed in the hands of a receiver to be rented, and the husband's share of the proceeds applied to the payment of his debts.

T. T. Forman and W. S. Cason, for the appellant.

J. T. Simon, J. Q. Ward, and Blanton & Berry, for the appellee.

127 GUFFY, J. It appears from the record in this case that prior to 1885 the appellee, H. D. Frisbie, was a prosperous business man, in apparent good financial condition, and that, in addition to his individual business, he was in partnership with — Lake, but that some disease seized a large number of cattle belonging to him, or the firm of Lake & Frisbie, and perhaps some other financial reverses befell him, rendering him, as it seems, unable to pay his debts, and that he made an assignment in 1885, but the firm did not assign.

It also appears that said Frisbie owed about \$21,000, and that his assets were about \$6,000. About \$15,000 of the indebtedness was due to appellee's father in law, Judge Day, the other principal creditor being the appellant.

After paying the cost of settling the estate assigned, and also paying the appellee, Mrs. Frisbie, \$1,000 for her contingent right of dower in real estate assigned, the estate only paid 18.42 cents to the dollar on the ordinary claims.

Appellant's claim was a debt due from the firm of Frisbie & Lake, and, in 1888, it obtained judgment against H. D. Frisbie, surviving partner of said firm, as well as individually, for the sum of \$4,872, with interest from the 22d of ¹²⁸ April, 1886, upon which executions were issued and returned no property found, but it also appears that \$988.62 was paid on the judgment by the master commissioner, in case of Lake v. Lake, September 8, 1888; also paid by the master commissioner, as it seems, out of the assets assigned as aforesaid, \$1,036.52, January 5, 1889.

In 1887, the appellee, Mrs. Frisbie, was by judgment of the court empowered to do business as a feme sole. On the 18th of November, 1892, the appellant instituted this action in the Harrison circuit court, seeking to subject certain property conveyed to Mrs. Frisbie to the payment of its said judgment.

It is alleged in the petition that the appellee, Mrs. Frisbie, has the legal title to certain parcels of valuable real estate, conveyed under the circumstances set out, viz., one parcel or lot in Cynthiana, Kentucky, on east side of Walnut street, between Pike and Pleasant, conveyed to her by W. H. Hutman and wife, on the 23d of March, 1880, which was made to her at the request of her husband, who, out of his own means, paid therefor \$1,100 cash in hand.

It is also charged that, after the creation of the debt sued on,

H. D. Frisbie, with the fraudulent intent and purpose to cheat, hinder, and delay plaintiff in the collection of its debt, and of which purpose appellee, Mrs. Frisbie, had knowledge, did erect on said grounds two double brick houses—that is, four dwellings—one of which he and his family occupy; another is held and occupied by their tenant, defendant T. B. Smith; another by one Givens, and the fourth by defendant, Moses Levy, at a rental value of about \$25 per month each; that said improvements were erected by H. D. Frisbie out of his own means and property as an investment, and not for use of his family, except as to one ¹²⁹ set of the four dwellings, and cost about \$11,000, and are valuable and lasting.

2. That by deed of the 28th of January, 1887, Lewis Day's administrator conveyed to Mrs. Frisbie a lot of ground on the south side of Pike street, fronting on said street, the consideration being \$1,560, of which sum H. D. Frisbie paid \$527 for the same purpose as before charged, and that Mrs. Frisbie knew of the same and participated in the fraud; that the lot is improved, and rents for about \$30 to defendant, Mussellman.

3. That on February 17, 1892, T. W. Hedges conveyed to Mrs. Frisbie, in consideration of \$1,725, a certain house and lot on the east side of Walnut street, \$800 cash paid, the residue on time, which notes were assigned to the defendant national bank; that H. D. Frisbie, out of his own means, erected thereon a large three-story brick storehouse, glass and iron front, at a cost of not less than \$8,000. The same charges of fraud are made as to the purchasers and improvements.

4. That upon a lot allotted to Mrs. Frisbie, in settlement of the estate of Lewis Day, H. D. Frisbie, with like fraudulent purpose, erected, out of his own means and as an investment, on said lot a frame warehouse and storehouse, at a cost of about \$1,000; the same being valuable and lasting, and increasing the rental value from nothing to about \$30 per month.

The appellant prays that the various parcels of property be put into the hands of a receiver to be rented out, and the rents paid into court, to be apportioned between the plaintiff and Mrs. Frisbie in proportion to the amounts paid by her and that paid by H. D. Frisbie, including the cost of the improvements, except that he asks a sale of the ¹³⁰ third tract named, and asks for all proper and general relief.

The answer of appellees may be considered a traverse of all the allegations of the petition, and, in effect, alleges that all the purchases and payments were made out of and with the means

of Mrs. Frisbie. Appellant in its reply traversed the material averments of the answer. The court upon final hearing dismissed plaintiff's petition, and from that judgment this appeal is prosecuted.

It appears that H. D. Frisbie in some way paid or settled all debts against him except appellant's claim. The testimony conduces to show that Mrs. Frisbie constituted her husband her attorney in fact, to do business for her, and that he engaged extensively and very successfully in business.

He engaged in Cincinnati in business under the sign of King's Royal Germature, and made considerable money, his family then living in Cynthiana, Kentucky, and finally sold out the business for \$12,500. H. D. Frisbie also conducted a furniture, undertaking, and wallpaper business, under the name of Frisbie Furniture and Wall Paper Co. The name of H. D. Frisbie was for a time on the front of the awning in front of the door, but it was taken down, H. D. Frisbie saying it was put there by mistake.

The proof also conduces to show the rental values to be something like the sums alleged in the petition, and that H. D. Frisbie conducted a paying and profitable business, and was the real manager, Mrs. Frisbie rarely, if ever, paying any attention to the business. He also speculated some in South Dakota, and perhaps in Illinois, some or all being profitable.

Mrs. Frisbie does not testify in the case, but the husband ¹³¹ does, and from his notion and construction of Mrs. Frisbie's property, including what he claims to have given her before his failure, shows that she had considerable property before she was authorized to trade as a feme sole.

The proof conduces to show that all the property claimed by Mrs. Frisbie was, in May, 1893, worth perhaps between \$35,000 and \$40,000, with perhaps an indebtedness due from her of \$10,000 or \$11,000.

There can be no doubt as to the fact that Mrs. Frisbie received several thousand dollars from her parents, and that about \$1,000 was by her father given to H. D. Frisbie, but which it seems he afterward undertook to restore to his wife.

We do not deem it necessary to discuss the allegations of fraud made in the petition. It seems clear to us that the increase or accumulation of property and means is chiefly due to the labor and skill and energy of H. D. Frisbie.

In *Moran v. Moran*, 12 Bush, 303, it is substantially said that all an insolvent husband may be able to earn beyond the exemptions should go to his creditors, yet appellee's contention in

this case is that such earnings may legally be given to the wife.

It will not be contended that if the husband had owned property before the creation of plaintiff's debt, or acquired property afterward, that he could make a gift of the same to his wife and thus defeat the claim of the appellant; and yet if appellee's contention in this case be conceded the same result is reached. The fact that the husband engaged to render service at an inadequate price cannot change the principle involved.

It seems to us that appellee, H. D. Frisbie, was at the time of the trial of this case, June 8, 1893, equitably entitled ¹⁸² to at least \$3,000 interest in the property described in the petition and evidence over and above exemptions, exclusive of the homestead, and that this interest, to the extent of \$3,000, should have been subjected to the payment of plaintiff's claim, and that the court erred in dismissing appellant's petition.

The judgment is, therefore, reversed and cause remanded, with directions to adjudge a sale of enough of the property, excluding the homestead, to pay plaintiff \$3,000, with interest from June 8, 1893, or to place same in the hands of a receiver, to be rented out until the said sum is paid. The chancellor will adopt the mode by him deemed most equitable, and for further proceedings consistent with this opinion.

HUSBAND AND WIFE—SEPARATE ESTATE OF WIFE—WHEN CHARGEABLE WITH HUSBAND'S DEBTS.—If a man skilled in any employment does business in his wife's name with the capital furnished by her, and large profits over and above the necessary expenses of the business, including the support of himself, wife, and family, accrue therefrom, owing to his skill and experience, and he turns such profits over to his wife, or invests them in property for her, a court of equity will treat such arrangement as fraudulent, and will make an equitable distribution of such profits between the wife and existing creditors of the husband: *Boggess v. Richards*, 39 W. Va. 567; 45 Am. St. Rep. 939, and note. See, contra, *Rush v. Vought*, 55 Pa. St. 437; 93 Am. Dec. 769. See, also, *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Michigan etc. Co. v. Chapin*, 106 Mich. 284; 58 Am. St. Rep. 409, and monographic note.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. COMMONWEALTH.

[99 KENTUCKY, 132.]

CRIMINAL STATUTE, WHEN VOID FOR UNCERTAINTY.

A statute declaring that any railway corporation which shall charge, collect, or receive more than a just or reasonable rate of toll or compensation for the transportation of passengers and freight or the use of any railway car shall be guilty of extortion, is void for uncertainty, because it furnishes no test by which to determine what charges for its services are just or reasonable, as it cannot be known therefrom, when a charge is made, whether it is lawful or not, nor can this be ascertained except by the verdict of a jury.

CRIMINAL LAW, CONSTITUTIONALITY OF.—An act cannot be made criminal which the party committing cannot know in advance whether it is criminal or not. Hence, the making of an unreasonable charge for services cannot be made criminal under a statute creating no test of reasonableness in this respect.

William Lindsay, J. W. Alcorn, E. W. Hines, Lisle & McChord, Walker D. Hines, and H. W. Bruce, for the appellant.

W. J. Hendricks, W. J. Sweeney, and H. W. Rives, for the appellee.

132 HAZELRIGG, J. The indictment in this case charges that the appellant "did unlawfully charge, collect, and receive from A. Vancleave & Co. the sum of forty-one and 70-100 dollars as toll or compensation for the transportation of a carload of coal, weighing 53,800 pounds, being at the rate of one and 55-100 dollars per ton, from Pittsburg, Ky., to Lebanon, in Marion county, over the line of said railroad, a distance of — miles, the said rate of one and 55-100 dollars per ton for the said transportation of said coal, being more than a just and reasonable compensation therefor, contrary to the form of the statute, etc."

A conviction followed, and from the judgment on the verdict of the jury for the sum of \$500 the company has appealed.

Its complaints are, that the statute prohibiting extortion by railroad companies, and providing a penalty therefor, prescribes no standard as to what is just and reasonable for the guidance of the corporation, and altogether fails to define what it may and what it may not do; that it is, therefore, void for uncertainty; that even if the statute is valid, the indictment states no facts showing the appellant guilty of the offense charged, but only the conclusion of the pleader that the rate charged was more than a just and reasonable compensation.

It is also urged that the trial court erred in refusing to grant to appellant a change of venue upon the testimony heard, and in the admission of incompetent evidence; and it further insists that, on the facts of the case, the charge is reasonable and just,

within the meaning of the statute, ¹⁸⁶ and especially so as the charge is within the rate allowed by the company's charter.

The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in sections 816 and 819 of the Kentucky statutes. The first-named section reads as follows: "If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or the use of any railroad car upon its track, or upon any track it has control of or has the right to use in this state, it shall be guilty of extortion."

Section 819 fixes the penalty for the first offense at not less than \$500, nor more than \$1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into or through which the road runs, and the Franklin circuit court, are given jurisdiction of the offense, the prosecution to be by indictment or action in the name of the commonwealth, upon information filed by the board of railroad commissioners.

That this statute leaves uncertain what shall be deemed a "just and reasonable rate of toll or compensation" cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.

The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a ¹⁸⁷ crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute

would not be the taking of property without due process of law and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws.

In *Louisville etc. R. R. Co. v. Railroad Commission*, 19 Fed. Rep. 679, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): "Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define, with reasonable certainty, what would constitute such "fair and just return." The act under review does not do this, but leaves it to the jury to ¹³⁸ supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of four per cent, while another might acquit an accused who had demanded and received at the rate of six per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms."

The supreme court of the United States, in *Railroad Commission Cases*, 116 U. S. 336, refers to this Tennessee case, and substantially approves it by distinguishing the case then before the court from the Tennessee case.

This case is also used to support the text in 8 *American and English Encyclopedia of Law*, page 935, where it said: "Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates this is a question which is a proper one for a jury."

Mr. Justice Brewer, in the case of *Chicago etc. Ry. Co. v. Dey*, 35 Fed. Rep. 866, had under consideration the provisions of a statute similar to the one we have before us, and, while the statute was upheld, it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge then said: "Now the contention of complainant is, that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal and punished by fine, and that such

a statute is too indefinite and uncertain, no man being able ¹³⁹ to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

"In Dwarris on Statutes, 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters': See, also, *United States v. Sharp*, Pet. C. C. 122; *The Enterprise*, 1 Paine, 34; *Bishop's Statutory Crimes*, sec. 41; *Lieber's Hermeneutics*, 156."

And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against anyone who should be guilty of "improper conduct," and a statute which makes it a "criminal offense to charge more than a reasonable rate."

The same learned judge, discussing the kindred subject of unreasonable differences in rates, in *Tozier v. United States*, 52 Fed. Rep. 917, said: "But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

When we look to the other side of the question we find the contention of the state supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. ¹⁴⁰ Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions, the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury. It is, in fact, a question of contract. Common carriers are "bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which they are authorized to engage": *Winona etc. R. R. Co. v. Blake*, 94 U. S. 180.

If this charge is more than is reasonable, there is a violation of the contract, and the suit of the person aggrieved is because of such violation.

In some states, the shipper is entitled to recover double or

triple the amount of the excess, but this does not change the nature of the action.

The nearest approach to an authority for the state's contention is a case in which the shipper sued the carrier, and is reported in *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278. There the first section of the act under consideration, of which our statute is a substantial copy, was attacked for want of certainty in defining the act of extortion, the contention being that the determination of what is a fair and reasonable rate must depend upon a variety of considerations such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability as affected by the value of the articles carried, the value of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.

The court said "that the difficulties which stand in the way of determining what are reasonable rates also stand ¹⁴¹ in the way of embodying in a legal enactment such an exact definition as is insisted upon. . . . The first section of the statute is merely declaratory of a well-known principle of the common law. At common law, the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire (*Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457), and the court was to judge of the reasonableness of the freight charges. . . . Undoubtedly, the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges: *Dow v. Bridelman*, 125 U. S. 680; but in the absence of statutory regulation upon the subject the courts must decide what is reasonable."

As we have seen, the action was one by a shipper against the carrier, and was in the nature of a suit for damages for a breach of the contract. The court, however, made its meaning clear by references to and approving its former construction of the act as found in *Chicago etc. R. R. Co. v. People*, 77 Ill. 443, and of that case said: "But we held in *Chicago etc. R. R. Co. v. People*, 77 Ill. 443, that the first section of this statute should be construed in connection with the eighth, and that the latter section, by providing for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each of the railroad corporations in the state, furnished a uniform rule for the guidance of the railroad companies. In that case we said: 'When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed.'"

As this Illinois section appears to have been substantially re-enacted here without, however, accompanying it with the provision for a standard, we quote the more freely from the Illinois court construing the section.

¹⁴² In *Chicago etc. R. R. Co. v. People*, 77 Ill. 443, the court said: "That section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad in this state of uncertainty and danger and exposed to such seeming injustice. . . . The eighth section provides how reasonable rates shall be ascertained; what they shall be; that the railroad and warehouse commissioners should make for each of the railroad corporations in the state a schedule of reasonable maximum rates, thus furnishing a uniform rule for the guidance of the railroad companies."

These authorities and the argument abundantly supporting them are sufficient. Other objections to the judgment below need not be discussed, as the one noted is fatal, and the statute cannot be enforced as a penal statute.

It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its ¹⁴³ charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law.

The judgment is reversed, with directions to dismiss the indictment.

STATUTES NOT VOID FOR UNCERTAINTY.—A statute declaring that if any railroad corporation shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensa-

tion for the transportation of passengers or freight it shall be deemed guilty of extortion, is not void for uncertainty in not declaring what is a fair and reasonable rate. The courts have power to determine what is reasonable: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278.

MILLER v. CAVANAUGH.

[99 KENTUCKY, 377.]

INTEREST ON PROMISSORY NOTE, FROM WHAT TIME TO BE COMPUTED.—A promissory note, payable two years after date, with interest at the rate of six per cent per annum from — until paid, bears interest from its date.

PRACTICE—WAIVER OF IRREGULARITIES.—If an amended petition is filed and a motion made for the appointment of a receiver, and the defendant answers the petition and resists the motion, he waives his right to afterward complain of any irregularity in the filing of the petition or the making of the motion.

L. J. Moore, for the appellant.

Bronston & Allen, for the appellees.

378 PAYNTER, J. This action is on a note executed by Miller to Cavanaugh for five hundred dollars, payable two years after date, "with interest at the rate of six per cent per annum from — until paid."

The judgment gave interest from the date of the note. It is insisted that it was error for the court to give interest from the date of the note upon the principle that when an obligation is silent as to when interest is to run the law implies that it bears interest only from the time it falls due.

379 We concede that to be the correct rule when a case arises for its application. This, however, is not that kind of a case. The blank date does not bring the case within the rule. The obligation is not silent as to interest, but provides that it is to draw interest at the rate of six per cent per annum until paid. It was to be paid at the end of two years and "with interest."

It provides for an annual interest. It cannot be said that the note only draws interest after maturity. It was to be paid at a given date, and it is unreasonable to suppose that a note for the payment of money on a particular day, with interest at a certain rate per annum until paid, could be construed to mean that the interest should commence on the day of payment and not before, for the law would give interest from that date.

The language specifying interest shows that it was the intention of the parties that the note should draw interest from date. We conclude that the parties were contracting for interest on the note for a period of time when the note would not draw interest

except for such contract, and not for a time subsequent to the date when the note was to be paid. It was useless to make a contract for interest after the default of payment, when the law would allow interest on the note from such time.

We think *Winn v. Young*, 1 J. J. Marsh. 52, 19 Am. Dec. 52, supports our conclusion. Besides, the petition alleges that defendant agreed and promised to pay the note, with interest from its date until paid. The answer fails to controvert this allegation. The allegations of the petition, we think, are sufficient to authorize a recovery on the note.

The plaintiff held the note in suit and four others for the balance of the purchase money which the defendant had ^{also} agreed to pay him for a house and lot in Lexington, Kentucky. The plaintiff without notice entered a motion to place the property in the hands of a receiver, and also offered and the court permitted an amended petition to be filed. Defendant filed an answer to the amended petition and resisted the motion to place the property in the hands of a receiver. On the hearing of the motion the defendant filed such affidavits as he desired.

If there was any irregularity in entering the motion and filing the amended petition, the defendant waived his right to complaint by entering his appearance to the motion and filing an answer to the amended petition.

Without reviewing the facts, suffice it to say that we are not inclined to disturb the judgment of the court placing the property in the hands of a receiver.

The judgment is affirmed.

INTEREST ON PROMISSORY NOTE—WHEN BEGINS TO ACCRUE.—Interest is to be computed from the date, and not the maturity, of a promissory note which contains a stipulation if not paid when due to bear interest at a certain rate: *Horn v. Nash*, 1 Iowa, 204; 63 Am. Dec. 437. It seems to be generally agreed that where an instrument is payable at a future day, with interest, and nothing is said as to when the interest is to be calculated from, it is to be computed from the date of the instrument: Extended note to *Horn v. Nash*, 63 Am. Dec. 439; monographic note to *Selleck v. French*, 6 Am. Dec. 189.

PLEADING—WAIVER OF IRREGULARITIES.—All technical or formal objections to a pleading must be raised by motion or demurrer before trial, or if not so raised they are deemed to be waived: *Orman v. Mannix*, 17 Colo. 564; 31 Am. St. Rep. 340; or the waiver may be by pleading over: *Gelatt v. Ridge*, 117 Mo. 553; 38 Am. St. Rep. 683; or by failure to take advantage of irregularities by his pleading: *Harris v. Morse*, 49 Me. 432; 77 Am. Dec. 269.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v.
GAINES.

[99 KENTUCKY, 411.]

ACTION, WHEN EX DELICTO RATHER THAN EX CONTRACTU.—An action against a railway corporation, the complaint in which alleges the purchase of a railway ticket and the facts necessary to entitle the plaintiff to be carried as a passenger, and that he was ejected from the train against his will, is *ex delicto* rather than *ex contractu*.

RAILWAY CORPORATIONS, LIABILITY OF FOR MISTAKE IN TICKET.—If a person applies for a first-class passenger ticket, and by mistake of the agent is given a limited ticket, in consequence of which he is ejected by the conductor from the train, the railway corporation is liable in an action of tort for the injuries sustained by such ejecting.

Winslow & Winslow, for the appellants.

Gaunt & Downs and J. A. Donaldson, for the appellee.

412 **PRYOR, C. J.** The appellee purchased of the ticket agent of the appellant a first-class ticket to Crab Orchard from the city of Cincinnati. The office was at Fourth and Vine streets. 413 He paid for his ticket and proceeded at once to the depot, where he discovered the train was then moving off and out of his reach. He returned to his hotel, and left on the next train the following morning.

After starting on his journey, the conductor on the train of appellant applied for his ticket, and, upon examining it, found it was a first-class limited ticket, and out of date the day previous. He refused to receive the ticket, and under instructions from those in authority, having consulted them by telegram, took the appellee by the lapel of his coat and against his will led him off the train. Some loud talking between them preceded his removal, the appellee refusing to leave the train, but claiming the right to be carried to his place of destination.

When the ticket agent made out his ticket he placed it in an envelope and handed it to the appellee, the latter making no examination of it.

The appellee was taken from Covington to Milldale, and there transferred to another train of appellant, and from this last train was ejected.

The appellant's agent contradicts the statement made by the appellee, and says he sold him the ticket, as a limited ticket, for four dollars and thirty-nine cents, while the regular first-class ticket was six dollars, and this would seem to sustain the agent in his version of the matter.

We think, however, there was evidently a mistake made by the ticket agent, as it does not appear the appellee knew they were selling such tickets, and he swears he applied for a first-class passenger ticket to Crab Orchard, and there is no doubt but he supposed he had paid for such a ticket. So positive was he of his right to go upon the ticket that he requested the conductor to inform himself by telegram, ⁴¹⁴ and the answer he received was to "put him off the train." He was made to leave the train about thirty miles from his home, and it seems to us without much reason on the part of the company, but, in so far as the conductor was concerned, it was his duty to obey the orders of his superiors, and he is in no wise to blame. He, of course, looked to the ticket presented to him, and by that he was to be controlled in his action, and but for the mistake made by the ticket agent the company could not be held responsible.

It is claimed, however, there was no mistake made, and there was none if the ticket agent is right in his recollection of what transpired when he sold it, but the jury heard the testimony, and seem to have been satisfied the history of the purchase of the ticket was as stated by the appellee.

It is argued that no recovery can be had except on the breach of the contract to carry, and not then if the ticket presented does not evidence the obligation to transport the passenger. This would evidently be the correct rule if the mistake had not been with the company, as it can scarcely be held that a ticket worthless for travel when sold by the agent of the company can justify the ejection of the passenger from a train when the fault is that of the company, and not that of the passenger.

It is claimed that this is an action *ex contractu*, and not *ex delicto*. We cannot take this view of the petition. While many unnecessary facts are stated in the petition, they are mere matters of inducement, and what transpired when the ticket was purchased, and his going to the depot and entering the train, were facts stated, showing the rights of the plaintiff as a passenger, or, in other words, his right to be on the train.

When the appellee was taken off the train against his ⁴¹⁵ will, by the conductor laying hands upon him for that purpose, it was an assault and battery; and while no wounding or bruising of the person appears, the doctrine of *molliter manus imposuit* does not apply because the conductor had no right to remove him from the train.

The entire case rests on the testimony of the appellee and that of the ticket agent, and the verdict not being palpably against the

weight of the evidence, the verdict of two hundred dollars will not be disturbed.

The right to bring such an action is evident. If the fault of the agent of the company, the remedy by an action for tort, where the passenger is forcibly ejected, ought not to be questioned: *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631; 8 Am. St. Rep. 859; *Lake Erie etc. Ry. Co. v. Fix*, 88 Ind. 381; 45 Am. Rep. 464; *Pittsburg etc. R. R. Co. v. Hennigh*, 39 Ind. 509; *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358; 11 Am. St. Rep. 434.

There was no question made as to the jurisdiction for want of service, but, on the contrary, the party appeared and made defense.

Judgment affirmed.

RAILROAD COMPANIES—RAILROAD TICKETS—MISTAKE OF AGENT—DAMAGES.—One who, in good faith and without fault on his part, pays full fare and after inquiry accepts, in a poorly lighted station, an excursion ticket from the ticket agent, who assures him that it is good and will be accepted for his passage, has a right to board a train as a passenger, and, if his ticket is rejected by reason of expired limitation and he is ejected from the train for non-payment of fare, he may recover exemplary damages: *Callaway v. Mellet*, 15 Ind. App. 366; 57 Am. St. Rep. 238, and note.

ACTIONS.—A party may sue in tort instead of upon contract where the breach of the contract constitutes a wrong: *Sheldon v. Steamship Uncle Sam*, 18 Cal. 527; 79 Am. Dec. 193. See *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. OFFUTT.

[99 KENTUCKY, 427.]

LAW OF THE CASE.—While it is true that the rulings of a court upon a prior appeal are ordinarily irrevocable and settle the law of the case, to the enforcement of this rule it is essential that the law as stated on the first appeal be applicable to the facts appearing on the second.

EMPLOYER AND EMPLOYÉ—CONTRACT FOR FIXED TERM—STATUTE OF FRAUDS.—A contract to employ a person for a fixed term is not illegal nor against public policy, nor is it within the statute of frauds.

EMPLOYER AND EMPLOYÉ—CONTRACT FOR FIXED TERM OF EMPLOYMENT, WHAT IS NOT.—A contract of a railway corporation to give one regular work as a freight conductor, and that such work shall continue so long as the employé faithfully and honestly works for his employer, is indefinite as to the time or term of employment, and is, therefore, subject to be terminated at any time at the discretion of either party.

EMPLOYER AND EMPLOYÉ. DISCHARGE FROM EMPLOYMENT CANNOT BE RETROACTIVE.—If one is employed as a freight conductor by a railway corporation, placed on its pay-roll,

and directed to wait until a place can be found for him, and is paid for two months' services, and on the twenty-sixth day of the third month is notified that he will not be allowed for any more time, he is entitled to pay for all of his time prior to the reception of such notice.

J. A. Mitchell, H. W. Bruce, and William Lindsay, for the appellant.

Edward W. Hines, Sims & Covington and H. B. Hines, and J. Barbour, for the appellee.

⁴²⁹ LANDES, J. The appellee, having been employed for a number of years as brakesman and freight conductor by the appellant on its road from Bowling Green, Kentucky, to Nashville, Tennessee, was discharged in the month of April or May, 1890, for violating some of the rules of the company.

Early in the month of July following there was a pending strike among the trainmen of the company at Wilder's Station, near Cincinnati, Ohio, when it became necessary for the company to procure men to take the place of the strikers, in order that it might be enabled to handle its freight traffic promptly. For this purpose one W. J. Stewart, who was at the time a "detective" or "special agent" in the employment of the company, was sent by Mr. Metcalfe, the general manager, to Bowling Green, and under special authority conferred upon him by the general manager proposed to hire the appellee to go to Wilder's and work for the company in moving its trains, which had been stopped by reason of the strike, offering him five dollars per day and his expenses for the time he might be thus employed. The ⁴³⁰ appellee accepted this special employment, went to Wilder's on transportation furnished him by the company, worked for the company for two or three days, returned to Bowling Green after the trouble with the strikers was settled, and was paid for the whole time he was absent, including the days of his actual service, making eight days in all, the sum of forty dollars.

The appellee claims that, at the time he accepted the employment for the special service referred to, he asked Stewart that he might be restored to the position in the service of the company from which he had been discharged as above stated, and that Stewart then and there promised and contracted with him in substance that he should be restored to the position, and that he should keep it so long as he did faithful and honest work for the company. He claims that the same contract was made with him, also, by G. E. Evans, who was the superintendent of transportation in the service of the company, and whom he met at Wilder's and subsequently after the special employment was terminated

by Mr. Kelland, who was the assistant general manager of the company. But each of these men denied in his testimony that he made any such bargain or contract with him, and it appears from the testimony of both Stewart and Evans that they had no authority to make any such contract for the company; that such authority did not appertain to the positions which they held, but that the employment of men for such regular service of the company was within the purview of the authority and duties of the division superintendents and their superior officers. But it appears from the evidence that the appellee was kept on the payroll as freight conductor, with directions to wait until a place could be found for him, and that besides ⁴³¹ the forty dollars paid to him for said special service he received forty-six dollars as the balance of his pay for the month of July, and eighty dollars for the month of August, and that on the twenty-sixth day of September, 1890, he received formal notice from the company that he would be allowed no more time, which was equivalent to a discharge from the service of the company.

This suit was brought by the appellee on the eleventh day of October, 1890, to recover pay for the time, to the twenty-sixth day of September, for which he had received no pay, and the sum of ten thousand dollars damages for breach of the alleged contract for regular or permanent employment. There is no controversy between the parties as to the special employment of the appellee by Stewart for service at Wilder's, or as to the pay he was to receive and did receive therefor. But the alleged contract for regular employment is stated in the petition to have been made at the time the contract for the special service was made, and is set forth in these words, viz: "And at said time the said defendant further agreed and promised and contracted with this plaintiff that when said strike was ended, and the regular trainmen returned to their work at said points, it would give to said plaintiff regular work as freight conductor on its road from Bowling Green, Kentucky, to Nashville, Tennessee, and would restore him to his old crew with which he had worked prior to his going to the state of Ohio, and that said regular work would continue so long as this plaintiff did faithful and honest work for the defendant."

In an amended petition the same statement of the alleged contract was substantially made, with this addition, viz: "And that as his compensation for such work they would pay him at the rate of ninety-five dollars per month, which said sum of ninety-five dollars they agreed and promised to pay him monthly."

⁴³² The allegations of the petition and amendments were de-

nied by the answer, and the issue thus made was tried before a jury in the court below in June, 1891, and upon a verdict in favor of the appellee for five hundred and seventy-five dollars a judgment was rendered, which was reversed on appeal to the superior court, and the case sent back for a new trial. The second trial resulted in a verdict and judgment against the appellant for fifteen hundred dollars, and the court having refused to grant a new trial that judgment on appeal is now before us for revision.

At the conclusion of the testimony, the court, on its own motion, gave to the jury eight instructions which embodied the views held by the court as to the law of the case, all of which were excepted to by counsel for the appellant. Counsel for the appellant also made three requests for instructions which were refused by the court, and the action of the court in refusing the requests was duly excepted to. Error in thus giving and refusing instructions, and that the verdict was not sustained by sufficient evidence, and was contrary to law, were, with others, alleged as grounds for a new trial.

Counsel for the appellee in their brief rely mainly upon the opinion of the superior court, delivered in deciding the case on the former appeal, which, it is claimed, irrevocably settled the law of the case, and in attempting to apply the law as it was held by the superior court to the case as it is presented in the record before us, it is contended that the judgment must, therefore, be affirmed. Ordinarily, it may be conceded the ruling of this court in such cases has been and should be according to this contention of counsel: *Adams Exp. Co. v. Hoeing*, 88 Ky. 373.

But we cannot allow that it would be proper for us to follow the opinion of that learned court in any such case, ⁴³⁸ unless the law as therein held applies to the facts in the record before us on a second appeal. On the former appeal, the superior court held that the contract alleged in the petition was not illegal or against public policy; that it was not within the statute of frauds, and that a discharged employé for a fixed term, who sues and whose case is tried before the expiration of his term of employment, can recover damages from his employer for discharging him only up to the date of the trial. These are undoubtedly correct principles of law, and that the first and second, as stated, unquestionably apply to this case as it appears in the record before us.

We can conceive of no reason for holding that a contract of employment or of service, either for a fixed term or for an indefinite time, would not be legal or would be against public policy. In actual experience such contracts are constantly made. And on both principle and authority such contracts must be held not

to be within the statute of frauds, and, therefore, may be made by parol. The third principle or rule is likewise well settled. But whether it applies to this case must be determined from this record. It is clear to us, after a careful examination of the evidence in the record, that the appellee failed to establish that a contract of any kind was made between the appellant and him, except for the temporary and special service that has been stated, and for which he received as he admits the sum of forty dollars. Beyond this he failed either to allege or prove that he bound himself to serve the appellant, either for a definite or an indefinite time, even conceding that the appellant promised to employ him as alleged in the petition. Upon his own showing, the appellant had no right to make him answer in damages if he failed or refused to enter its service.

434 It will thus be seen that the essential element of mutuality of obligation was omitted from the alleged contract of hiring, for the breach of which his suit was brought. In addition to this, the evidence clearly shows that the two officers or employes of the appellant, Stewart and Evans, the "special agent" or "detective," and the superintendent of transportation in the service of the appellant, who, he alleged, promised him his old place in the service of the company, had no authority to bind the appellant by any such contract of hiring. And it is scarcely conceivable that the appellee, who had been in the service of the company, as he testified, for twelve or thirteen years, did not know that such employes of the appellant had no authority to employ its conductors for regular or permanent service, or that he was not aware that it was the custom of the appellant, which was shown by uncontradicted testimony, to employ conductors, brakemen, etc., without reference to any length of time of service, and subject to dismissal at any time and with the right on the part of such employes to leave the service at any time. Nevertheless, it further appears clearly from the testimony that the appellant, without being bound by contract so to do, placed the name of the appellee on its payroll, with directions to him to wait until employment could be found for him, and that it expected and intended to furnish him employment, doubtless of the character of his former employment from which he had been discharged. Having done this, and having paid the appellee for a portion of the time of his waiting for work as if he were in actual employment, as he was directed or requested to do, the appellee had the right to expect payment for the whole time of his waiting up to the date on which he was notified of his discharge.

435 But if it be conceded that there was a contract for regular

employment, as alleged in the petition and amended petition, still the contract, as alleged and proved, being that "said regular work would continue so long as this plaintiff did faithful and honest work for the defendant," was a contract indefinite as to the time or term of employment or service, and was, therefore, subject to be terminated at any time at the discretion of either party to it: *Louisville etc. R. R. Co. v. Harvey*, 99 Ky. 157.

The inevitable conclusion is, that the principle or rule of law laid down in the opinion of the superior court as to the recovery of damages by an employé for a fixed term who has been discharged without cause by his employer has no application to the facts of this case as they are presented in the record.

The well-settled rule with reference to the character of hiring that is set up in the petition and amended petition is that when the term of service is left discretionary with either party, or when it is not definite as to time, or when it was for a definite time, provided both parties are satisfied, in either event either party has the right to terminate it at any time, and no cause therefor need be alleged or proved: *Wood on Master and Servant*, 2d ed., secs. 133, 136; 14 *Am. & Eng. Ency. of Law*, 776, 790; *Louisville etc. R. R. Co. v. Harvey*, 99 Ky. 157.

In addition to the authorities here referred to, the rule as stated is sustained by the cases referred to, and quoted in the brief of counsel for the appellant, the case of *East Line etc. Ry. Co. v. Scott*, 72 Tex. 70, 13 *Am. St. Rep.* 758, being an especially instructive case. In the view that we have taken of the case, it is unnecessary to discuss the instructions given to the jury by the court. Being founded upon a ⁴³⁶ theory of the law as applicable to the case radically different from our views, it follows that they were erroneous. Upon the case as it is presented in the record, the appellant had the right to terminate the relation between it and the appellee at will and without cause, and is not liable for damages for so doing. But the appellee had and has the right to reasonable pay for the time he waited for employment or work from the appellant up to the date on which he received notice of discharge, and the third instruction requested by counsel for the appellant on this point ought to have been given. This will entitle the appellee to reasonable pay for his time to the twenty-sixth day of September, 1890, deducting what he has received therefor from the appellant.

The judgment is reversed and the cause remanded, with directions to set aside the verdict and award the appellant a new trial, and for further proceedings consistent with this opinion.

APPEAL—LAW OF THE CASE—WHAT IS.—The decision of the supreme court upon a former appeal in a case is, as to every point presented and decided on such appeal, the law of the case, binding upon both the parties and the court, so far as the same state of facts is substantially presented, but no further: *Murphy v. Albina*, 22 Or. 106; 29 Am. St. Rep. 578, and note; *Plymouth County Bank v. Gilman*, 4 S. Dak. 265; 46 Am. St. Rep. 786, and note.

CONTRACTS FOR PERMANENT EMPLOYMENT—STATUTE OF FRAUDS.—If a person carrying on the business of an enameLER agrees to abandon such business and enter the services of another, who, on his part agrees to furnish the former permanent employment at stipulated wages, such contract is not within the statute of frauds because it can be completely performed within a year: *Carnig v. Carr*, 167 Mass. 544; 57 Am. St. Rep. 488, and note; note to *Pennsylvania Co. v. Dolan*, 51 Am. St. Rep. 301.

MASTER AND SERVANT—CONTRACT OF HIRING CONSTRUED.—If one is employed to be paid by the month a designated price, this constitutes an entire contract by the month, which the employer cannot terminate at will, and under which he is liable for a month's wages if he discharges his employé without cause before the expiration of the month: *Moss v. Decatur Land etc. Co.*, 93 Ala. 269; 30 Am. St. Rep. 55, and note. A contract for permanent employment does not mean that the employment shall be for life or for any fixed or certain period, but only that it shall continue indefinitely and until one or the other of the parties shall wish for good reason to sever the relation: *Lord v. Goldberg*, 81 Cal. 590; 15 Am. St. Rep. 82, and note. See note to *East Line etc. R. R. Co. v. Scott*, 13 Am. St. Rep. 767, 768, and note to *Pennsylvania Co. v. Dolan*, 51 Am. St. Rep. 301-303.

AMERICAN ACCIDENT COMPANY v. CARSON.

[99 KENTUCKY, 441.]

INSURANCE—ACCIDENTAL INJURY.—The killing of the assured by a third person, though intentional, is deemed accidental within the meaning of an insurance policy, if the injury was not brought about by the agency of the assured.

INSURANCE AGAINST ACCIDENT—LIABILITY WHEN THE ASSURED IS INTENTIONALLY KILLED BY ANOTHER.—Though among the conditions of a policy insuring against accident is one providing that it shall not extend to, or cover, intentional injuries inflicted by the insured or any other person, or injury or death happening while the assured is insane or under the influence of intoxicating drinks, a recovery may be had for the death of the assured through his being intentionally killed, without this fault, by a third person.

INSURANCE AGAINST ACCIDENT—PLEADING.—If a policy insuring against injury or death from accident states the occupation of the assured, and provides for the recovery of less than the amount of the insurance in case of his injury while pursuing any of the occupations designated in the policy as hazardous, a complaint in an action upon the policy should state in what occupation the assured was engaged at the time of the accident.

O'Neal, Phelps, Prior & Selligman, and Bullitt & Sheild, for the appellant.

R. C. Warren, M. C. Saufley, W. G. Welch, and D. W. Sanders, for the appellee.

443 HAZELRIGG, J. In April, 1891, the appellant company, in consideration of certain agreements, statements, and warranties made in the application of one Stephen M. Carson, and the sum of seven dollars issued to him under "division A," wherein Carson's occupation was described as that of a druggist, a policy of insurance, known as an "accident policy," by which, for the term of three months, the applicant was insured against bodily injuries effected through "external, violent, and accidental means": 1. Which wholly disabled him; 2. Such injuries as partially disabled him; 3. Such as resulted in the loss of an eye; 4. Loss of a hand or foot; and lastly loss of both hands or feet, etc., in which event the full principal sum of five thousand dollars was to be paid to the insured, if he survived, or, if he died, then to his father, A. Carson, the appellee here.

In the body of the policy it was provided that if the insured was injured or killed in any occupation or exposure classed by the company as more hazardous than that recited in the application, the insured or his beneficiary should be entitled to only such sums as are named in the division so classed as more hazardous. And on the back of the policy, among many other conditions under which the policy was issued, we find the following: "This insurance does not cover disappearances nor suicide while sane or insane, nor injuries, whether fatal or otherwise, of which there is no visible mark upon the body, nor accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, . . . nor extend to or cover intentional injuries inflicted by the insured or any other person, or injury **444** or death happening while the insured is insane or under the influence of intoxicating drinks or narcotics," etc.

It appears that the insured met his death in May, 1891, and under circumstances to be presently considered. The company denying any liability, the beneficiary, A. Carson, brought this action in the Jefferson circuit court for the principal sum indicated in the policy, and upon peremptory instructions, at the conclusion of the testimony, a verdict was rendered in his favor. From the judgment thereon the company appeals.

After certain preliminary statements, the petition avers that "on the eighth day of May, 1891, and before the said term of insurance had expired, the said Stewart M. Carson was shot through the body by a ball from a gun or pistol, and thereby instantly and intentionally killed by one Jesse Burton, in the vicinity of Branford, in the county of said Carson's residence, in the state of Florida"; that "the said shooting and killing by the said Jesse Burton was not done in a mutual affray, was not provoked by any

misconduct on the part of said Carson, and was not foreseen by him in time to have been avoided, but was wanton, causeless, unprovoked, and unexpected by him."

It is evident, and it is so argued, that the pleader's object in setting out the fact that the insured came to his death by a shot fired through his body intentionally by another, thus anticipating the probable defense, was to provoke a demurrer, and thus present fairly to the court for construction the meaning of the words, "nor extend to or cover intentional injuries, inflicted by the insured or any other person," found on the back of the policy, and, therefore, not necessary to be adverted to in declaring on the contract. The expected demurrer was filed and overruled, and thus is presented for ⁴⁴⁵ our consideration two questions: 1. Were the "means" producing the death of the insured "external, violent, and accidental"? and 2. Was the death of the insured "an intentional injury inflicted by another" within the meaning of the policy.

On the first point little need be said. While our preconceived notions of the term "accident" would hardly lead us to speak of the intentional killing of a person as an "accidental" killing, yet no doubt can now remain, in view of the precedents established by all the courts that the word "intentional" refers alone to the person inflicting the injury, and if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means within the meaning of such policies.

Thus, where one was waylaid and assassinated for the purpose of robbery, his death was held to have been caused through "external, violent, and accidental means": *Hutchcraft v. Traveler's Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484.

So death by hanging at the hands of a mob was held to be an accident within the meaning of a policy against injuries through "external, violent, and accidental means": *Fidelity etc. Co. v. Johnson*, 72 Miss. 333.

So the death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by accident and "not a risk voluntarily assumed, where he makes the attempt without knowing that the other person is armed": *Lovelace v. Traveler's etc. Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638. See, also, numerous authorities to the same effect in notes to case last cited in 30 Law Rep. Ann. 207.

⁴⁴⁶ In *Hutchcraft v. Traveler's Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484, however, and in others cited, a recovery was denied, because, while the killings were accidental within the meaning of the words, "external, violent, and accidental," as used on the face of the policy, yet certain conditions or provisos protected the company against loss where "the death or injury may have been caused by intentional injuries inflicted by the insured or any other person."

And a consideration of this feature brings us to the second question presented by the demurrer.

In the cases to which our attention has been called, involving accident policies in many different companies, it is noticeable in all that the form of the usual protecting proviso against loss from "intentional injuries" is somewhat different from the corresponding clause in the policy before us. The clause in *Hutchcraft v. Traveler's Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484, will illustrate this. It is as follows: "And no claim shall be made under this ticket, when the death or injury may have been caused by intentional injuries inflicted by the insured or any other person."

This is not merely protection against injuries so inflicted, but against death as well. In express terms that policy excepts death from intentional injuries inflicted by any other person, and does not content itself with providing merely that no claim shall be made when the injury may have been intentionally inflicted. The language is "death or injury," and the policy protects against either death or injury when caused by intentional injuries inflicted by the insured or any other person. In the present case, as we have seen, the policy is not to extend to or cover intentional injuries inflicted by the insured or any other person. Here we find a difference between the policy under consideration and all others we have examined. The words "death or injury" are used ⁴⁴⁷ in all of them, and, indeed, in this policy we find those words separated for the first time in the clause under discussion. We find it provided in the preceding clause that the policy does not cover accidental injuries or death, resulting from hernia, etc., and immediately succeeding the clause in dispute the language is, "or injury or death happening while the insured is insane," etc. We notice, too, that the policy is not to cover injuries, whether fatal or otherwise, of which there are no visible marks upon the body, and it appears well settled that this exception, without the words "fatal or otherwise," has reference only to cases of bodily injury which do not result fatally—that is, the

word "injury" is used in its usual sense as implying a hurt not resulting in death: *McGlinchey v. Fidelity etc. Co.*, 80 Me. 251; 6 Am. St. Rep. 190.

The words "injury or death," and "injured or killed," are used in this policy some eight times or more, and seemingly in sharp contrast, and the significant omission of the word "death" in this particular clause requires us to hold that the exception referred only to nonfatal injuries intentionally inflicted by the insured or any other person.

We conclude, therefore, that the petition stated a good cause of action so far as the points discussed are concerned. It is insisted, however, that as the plaintiff sued for the full principal sum of five thousand dollars, he ought to have negatived the conditions stated in the face of the policy, under which, if they existed, that sum must have been reduced and the policy scaled.

The insured agreed that if he was killed in any occupation or exposure classed by the company as more hazardous than that of druggist his beneficiary was to get only a reduced sum, and it seems evident that his beneficiary must allege, if he can truthfully do so, that the insured was not so killed, ⁴⁴⁸ else the court could not render judgment for the sum to which the policy under its terms entitled him.

The policy was made part of the petition and forms the basis of the action. The claimant must bring himself within its terms and conditions as stated on its very face.

It cannot be said that this should come from his adversary. Whether the insured was engaged at the time of his death in a more hazardous occupation or exposure than that of a druggist was peculiarly within the knowledge of the insured and his beneficiary, who must be held to a general knowledge of the divisions and classifications of risks, and to have acted intelligently in accepting insurance in "division A."

Of course, if the true issue is in fact made, it does not matter from whom the exceptional matter comes, and it is true that the company pleaded that the insured was killed while acting as deputy sheriff, and attempted to plead that he was insured as a druggist or dealer and not otherwise, but just what its pleas would have been, had the plaintiff been required to set up its cause of action according to the terms of the contract, we do not know, and, convinced of this error occurring at the inception of the proceedings, no other questions need be considered.

Judgment reversed for further proceedings consistent with this opinion.

INSURANCE—ACCIDENT.—AN INJURY INTENTIONALLY INFLICTED on an assured by another person is an accidental injury within the meaning of a policy of insurance against injuries from external, violent, and accidental means, though the policy provides that the insured shall not be liable for intentional injuries. The word "intentional," as here used, refers to the acts of the insured alone: *Button v. American etc. Assn.*, 92 Wis. 83; 53 Am. St. Rep. 900, and note. See, also, *Lovelace v. Traveler's Protective Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638, and note.

INSURANCE—ACCIDENT—PLEADING.—Under a policy of insurance agreeing to pay a specific sum on proof of the death of the insured from bodily injuries effected through external, violent, or accidental means, provided, always, the death shall not have been produced by any of the various acts enumerated in the policy, it devolves upon the plaintiff to establish that the death of the insured was caused by external, violent, and accidental means. He thus makes out a prima facie case entitling him to recover. To prevent such recovery, the burden of proof is upon the insurer to show that the death arose from one of the excepted causes enumerated in the policy: *Extended note to Meadows v. Pacific etc. Ins. Co.*, 50 Am. St. Rep. 441; note to *Anthony v. Mercantile etc. Assn.*, 44 Am. St. Rep. 870.

BELKNAP v. LOUISVILLE.

[99 KENTUCKY, 474.]

ELECTIONS, CONSTITUTIONAL PROVISIONS AGAINST SPECIAL—MUNICIPAL INDEBTEDNESS.—If a state constitution declares that no more than one election in each year shall be held in the state or in any city, town, district, or county thereof, except as otherwise provided in the constitution, and that all elections for state, county, city, town, or district officers shall be held on the first Tuesday after the first Monday in November, the question of whether a municipality shall issue bonds cannot be submitted to a special election or an election held at any other time than that designated in the constitution.

ELECTIONS, SUBMITTING QUESTION OF INCURRING MUNICIPAL INDEBTEDNESS, EFFECT OF VOTERS NOT EXPRESSING THEIR OPINIONS ON THAT SUBJECT.—If a state constitution provides that no municipality shall become indebted beyond an amount specified without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, and also provides for certain dates upon which all elections shall be held, it is necessary to authorize the incurring of such indebtedness that two-thirds of all the persons voting at that election vote in favor of the indebtedness. It is not sufficient that two-thirds of the persons voting upon that question vote in the affirmative.

R. H. Blain, for the appellants.

H. S. Barker and Humphrey & Davie, for the appellees.

478 DU RELLE, J. This suit was brought for an injunction to restrain the city of Louisville from issuing a million dollars of bond for park purposes. There were two grounds alleged for the injunction—the first and main ground urged being that at the election of November 6, 1894, the question of the issue of

bonds was submitted to the voters of the city, and that the proposition to issue did not receive the assent of two-thirds of the voters thereof, within the meaning of section 157 of the constitution and section 2854 of the Kentucky statutes.

It appears that at the election there were cast in the city of Louisville a total of 32,425 votes; that on the question of the issue of park bonds there were cast only 9,024 votes, of which 6,483 were cast in favor of the issue, and 2,721 against it.

Section 157 of the constitution provides that "no county, ⁴⁷⁷ city, town, taxing district, or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, and any indebtedness contracted in violation of this section shall be void."

It is contended for appellants that the total number of votes cast at the election in favor of the bond issue being less than two-thirds of the whole number cast at the election, the bond issue failed to carry upon the ground that the section referred to requires that two-thirds of the total vote cast at the election shall be cast in favor of the issue.

Appellees contend that the words "two-thirds of the voters thereof voting at an election to be held for that purpose" restrict us to the consideration of the total number of votes cast for and against the question of issuing bonds, and that, therefore, more than two-thirds of the votes of those voting "for that purpose" were cast in favor of the bond issue. In other words, appellee's contention is, that in the "election held for that purpose" only the votes cast for that purpose—for and against the bond issue—can be considered, and that no account can be taken of votes cast for other purposes, such as the election of officers, although cast on the same day.

Great stress was laid by appellee's counsel upon the argument that the legislature might have provided for the submission of the question of the bond issue at a special election held on a different day from the regular annual election, and at which no other question or election was determined; and, as at such special election only the votes cast upon the bond issue could be considered, though the vote might, ⁴⁷⁸ and probably would be much less than the vote cast at the regular annual election, therefore, "a question submitted to the voters" is not in any way dependent on or connected with an election of officers, although submitted on the same day and by means of the same ballots; and, as the consti-

tution left it to the legislature to determine whether the question should be submitted on the day of the general election or on some other day, the action of the legislature in fixing the submission for the same day as the general election did not commingle or make them interdependent. In support of this contention, the case of Fidelity Trust etc. Co. v. Morganfield, 96 Ky. 564, is relied on. In that case it was held that the submission of an issue of bonds for municipal purposes might be upon a different day from that of the general election.

After careful consideration by a full bench, a majority of the court are unable to adhere to the doctrine laid down in that opinion. Section 147 of the constitution requiring elections by the people to be by secret official ballot provides that "the word 'election' in this section includes the decision of questions submitted to the voters, as well as the choice of officers by them."

Section 148 provides that "not more than one election in each year shall be held in this state or in any city, town, district, or county thereof, except as otherwise provided in this constitution. All elections of state, county, city, town, or district officers shall be held on the first Tuesday after the first Monday in November."

It is otherwise provided as to elections for school trustees by section 155, which excepts those elections from the provisions of section 145 to 154 inclusive, and as to elections for taking the sense of the people of a county, city, etc., as to ⁴⁷⁹ whether liquors shall be sold therein by section 61, which provides "all elections on this question may be held on a day other than the regular election days."

In this section the word "election" is used in the sense provided in section 147, and this provision indicates clearly that the word is used in section 148 to include questions submitted to the people, for otherwise there would be no need for the permission given by section 61. By section 152 vacancies in the general assembly may be filled at a special election.

It seems clear that the provision of section 148, that no more than one election each year shall be held in this state or in any city, town, district, or county thereof, except as otherwise provided in the constitution, applies to questions submitted to the voters, and the only provision otherwise in the constitution in reference to such questions is the one in regard to the submission of questions as to the sale of liquor.

When it is considered that the manifest purpose of the framers of the constitution, and of the people who ratified and gave it effect, was to put limitations upon the power of the local authorities in the matter of incurring debts, which would result in op-

pressive taxation, and even to limit the power of the people themselves improvidently to authorize the assumption of such obligations, the wisdom of the restriction of such elections to the day of the general election is evident. Not only is a much larger vote usually brought out on the occasion of the general election, but the people at large are usually better informed of the matters upon which they are entitled to vote by reason of the greater interest taken and the fuller discussion of such matters.

We come now to the main question presented in this record. By section 157 of the constitution it is provided: "No city . . . shall be authorized or permitted to become indebted, ⁴⁸⁰ in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose."

The object of this provision was to limit the power of the local authorities and the people to burden themselves and their posterity with taxation, except upon full consideration and by the assent of the people given understandingly. In order to effect that object, it was provided that no city should be authorized to become indebted in excess of the current year's revenue without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose. It was sought to protect the people from their own improvidence and that of their local officials, and such a construction must be given to the constitution as will give effect to its manifest purpose.

There could be but one election in the year except in the cases specially provided for. This question was to be submitted to the people at that election. It was one election, though held for several purposes, and was in no sense a collection of elections held on the same day. One of the purposes of the election was to determine this question, which, under authority of the constitution, the statute and the ordinance passed in accordance therewith was to be submitted to the voters of the city. It was required that two-thirds of the voters of the city voting at such election should give their assent to the bond issue. Assent implies action, and is not mere failure to dissent. At the election held for the purpose of electing various officers, and for the additional purpose of determining the question of the bond issue, there were cast 32,425 votes, and of all those voters voting at the election held for those purposes but 6,483, less ⁴⁸¹ than one-fifth of the total number, gave their assent to the proposition to impose on the city of Louisville the burden of an additional debt of a million of dollars.

The authorities which, to a greater or less degree, bear upon this question are numerous and conflicting. It may be conceded that under a provision like the one under consideration it is not necessary that two-thirds of those entitled to vote should actually vote in favor of the proposition, and that as was said by the supreme court of the United States in *Carroll County v. Smith*, 111 U. S. 565, "the words 'qualified voters,' as used in the constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes; not one who, though qualified to vote, does not vote."

To the same effect are many authorities cited by appellees, and the reason of the rule is well stated in *People v. Wiant*, 48 Ill. 263, as follows: "It was held in *People v. Warfield*, 20 Ill. 160, that to give this provision of the constitution a practical operation we must presume that it was the intention of the framers of that instrument that the voters would all vote, and that the majority of those voting should determine the question. To give it a different construction would involve an inquiry whether there were other voters of the county, who had, from any cause, abstained from voting; and this would lead to interminable inquiry and invite contests in such elections which would be embarrassing and baneful, if it did not destroy all the practical benefits of laws passed under these provisions of the constitution."

But we are met with a very different question when the question is required to be submitted at a general election ⁴⁸² is one of the purposes for which that election is held, and is required to receive the assent of two-thirds of the voters of the city voting at that election.

In such case, the result depends on a majority of all the votes cast at the election being cast for the proposition, and not merely a majority of the votes cast on the particular question.

In the case of *People v. Wiant*, 48 Ill. 263, the constitution required that a majority of the voters should vote in favor of the removal of a county seat, and the court held, referring to the case in *People v. Warfield*, 20 Ill. 160: "In Warfield's case there was no vote taken at that election, except upon the question of the removal of the county seat, and that vote was adopted as the means of ascertaining the number of legal voters of the county, and whether the majority was in favor of or against removal. In this case, however, there was at the same time an election held for circuit judge, which was a regular election. We, therefore, have in this case additional means of ascertaining the whole number of voters of the county. If the return of the various poll-books of

the county showed a larger number of votes cast for circuit judge or other officer than were cast for and against removal of the county seat, then that should be taken as the number of voters of the county; and it should appear that a majority of the voters at that election had cast their votes in favor of removal before the county seat could be changed. It is not the vote cast upon that single question that is to govern, where it appears that any other election was held at the same time, but it must appear that a majority of all the votes cast at that election were in favor of removal. When there is no other election held at that time the returns of the officers of votes on that question will govern."

⁴⁸³ So in *People v. Brown*, 11 Ill. 478, a case of mandamus to compel township organization under a constitutional provision that "the general assembly shall provide by general law for a township organization whenever a majority of the voters of such county at any general election shall so determine," the court said: "The language is clear and explicit, and admits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters in the county."

In *Everett v. Smith*, 22 Minn. 53, the constitution provided that the question should be "submitted to the electors of the county at the next general election after the passage thereof, and be adopted by a majority of such electors," and it was held that the provision required a majority of the electors voting at the election and not a majority of those voting on the question.

So in *Enyart v. Trustees*, 25 Ohio St. 618, the legislature had authorized the levy of a tax, with this proviso: That the levy should not be made "until a majority of the electors of said township at some regular election shall vote in favor of said levy," and it was held that a majority of all the votes cast at the regular election was required, and not a majority of those voting on the question.

And in *State v. Foraker*, 46 Ohio St. 677, a provision of the constitution that, "if a majority of the electors voting at such election shall adopt such amendments, the same shall become a part of the constitution" was held not to be complied with by a majority of the votes cast on the amendment.

The Ohio constitution had another provision requiring the adoption of amendments which had been agreed upon by conventions "by a majority of those voting thereon," and ⁴⁸⁴ the court called attention to the difference in language, saying that "if the framers had had the same intention in framing section 1 as in framing section 3 as to how the majority for the adoption

of an amendment should be ascertained, they would have provided in that section, as in section 3, that it should be a majority of those voting thereon instead of a majority of the electors voting at such election."

This is directly in point in the consideration of the case at bar, for in section 256 of the Kentucky constitution we find it provided that the passage of an amendment to the constitution shall be determined by a "majority of the votes cast for and against an amendment"; and in section 64 it is provided that no county shall be divided, etc., "unless the majority of all the legal voters of the county voting on the question shall vote for the same." So that, in two other sections of the instrument, the convention was at no loss for apt words with which to limit the decision to the determination of those only who should vote upon the question.

In *State v. Lancaster Co.*, 6 Neb. 474, the constitution provided for a township organization, "whenever the majority of the legal voters of such county, voting at any general election, shall so determine"; and it was held that as the affirmative vote on the question submitted was less than a majority of those voting at the election the proposition was defeated.

In *State v. Winkelmeier*, 35 Mo. 103, authority was claimed under a legislative grant of power "whenever a majority of the legal voters" authorized the same, and the majority of those voting on the question were in favor of the grant; but the court said: "It is evident that a vote of 5,000 out of 13,000 is not the vote of a majority."

The case of *Hogg v. Baker*, 17 Ky. Law. Rep. 577, was under ⁴⁸⁵ section 64 of the constitution as to the removal of a county seat, which requires two-thirds of those voting to decide. That case, however, was decided largely on the ground that the voters were misled, and nothing appears in the record of the case at bar to show that the voters of Louisville were misled, except as it may be argued inferentially from the language of the statute and the ordinance and the smallness of the vote cast upon the question.

Little weight can be given the argument drawn from the fact that at a general election candidates for various offices may be elected notwithstanding other candidates for other offices may have received more than twice as many votes. The statute of election provides that the person receiving the highest number of votes for an office shall be declared elected to that office, and the election is decided by a plurality of votes.

Moreover, it may well be considered that there is an essential difference between the action of electors in voting for a candidate for office and in assenting to the creation of a municipal

debt. The former is the exercise of a political privilege, the mere selection of a person to perform officially duties which have been annexed to a particular office, and it is fair to presume that those who do not participate in the election consent to be governed by those who do; but the latter is the authorization of a contract by which the people of the locality incur obligations and bind their property to the payment of a debt; and it is natural to expect that the language used in relation to it will be different; that definite action will be required of a majority of the voters, and that it will be required that their assent thereto shall be expressed, and so we find it in the constitution and the statute.

If the submission were permitted to be and were in fact ⁴⁸⁶ submitted at an election at which no votes were cast except upon the proposition, it might very well be concluded that the words "two-thirds of the voters of the city" meant two-thirds of those who see fit to exercise their privilege, and that the ballot-box is the only test to be applied: *Louisville etc. R. R. Co. v. Davidson County*, 1 Sneed, 637; 62 Am. Dec. 424.

In this case, the test of the ballot-box shows that only one-fifth of the voters who voted at the election gave their assent to the proposition.

There were many authorities cited on both sides of this question, but it would be unprofitable to review them in detail. A very interesting analysis of a large number of them is given in *South Bend v. Lewis*, 138 Ind. 512. It will be found that they have turned, in some cases, upon the settled policy of the constitution which was under consideration, as in the case of *Metcalf v. Seattle*, 1 Wash. 297, which at first blush appears to be directly in point against the conclusion reached by this court.

In most of the cases, the courts' conclusions were reached by considering not only the language of the provision in question, but all other relevant sections of the instrument, as well as its general intent. These differ in the different cases, and it is not surprising that the courts have apparently differed in the weight which they have attached to the arguments drawn from them. Several of the cases cited have been doubted or qualified in subsequent cases. One of them, *Gillespie v. Palmer*, 20 Wis. 544, much relied on by counsel for appellee, has since been referred to by the chief justice of the Wisconsin court as one of a number of cases "which have long been a reproach to the court, as judgments proceeding upon policy rather than upon principle": *Bound v. Wisconsin Cent. R. R. Co.*, 45 Wis. 543.

⁴⁸⁷ In all of the cases the object sought was the intent of the instrument.

In the case at bar, not much consideration has been given to the debates of the convention, though the members who spoke appear to have given section 157 the same construction with this court: "For, as the constitution does not derive its force from the convention which framed, but from the people who ratified, it, the intent to be arrived at is that of the people; and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed": Cooley's Constitutional Limitations, 6th ed., 80, 81.

"Its terms must be taken in the ordinary and common acceptance because they have been so understood by the framers and the people who adopted it": State v. Lancaster, 6 Neb. 474.

These considerations have led us to reject the construction contended for by appellees, of which it may be said, in the language of the Ohio court in State v. Foraker, 46 Ohio St. 677: "But one of the most obvious objections to this construction is that it requires to be demonstrated by such a labored process of occult reasoning upon the meaning of words and phrases so different from the apparent meaning as to warrant the belief that it never occurred either to the framers of the constitution or to the people who adopted it."

And in this case we cannot believe that any considerable number of the voters who read section 157 of the constitution before voting for its adoption thought for a moment that that provision upon its face restrictive of the power to create additional indebtedness could be so construed as to ⁴⁸⁸ authorize the creation of a million dollar debt upon the vote of some six thousand out of some thirty odd thousand voters actually at the polls.

We are not unmindful of the need for parks in a great city, and the benefits of a park system such as the one proposed and in fact instituted in the city of Louisville, but the people who are to bear the burden must give their assent to the creation of the debt to be incurred for that purpose.

There is another ground upon which this conclusion might be rested. The constitutional provision is restrictive. It forbids the creation of the debt unless upon the assent of two-thirds of the voters, etc. Had section 157 provided, as in section 64, that it should not be authorized unless two-thirds of the voters of the city "voting on the question shall vote for the same," that would not have required the legislature to authorize the submission of the question, nor the city authorities to submit it. So as the

right to submit might have been denied altogether, it might be given with additional restrictions, as the requirement of a three-fourths vote; and when the city council by ordinance provided for the submission to the vote of the people, it might have imposed an increased restriction; so that if we were of opinion that the constitution required only two-thirds of those voting on the question, we must still look to the act and the ordinance to find if they, or either of them, require any additional prerequisite to the bond issue. The statute is as follows:

"Sec. 2854. For the purpose of raising money for the purchase or improvement of lands for park property, the general council of a city may, by ordinances, submit to the qualified voters of the city the question as to whether the city shall issue bonds, without interest coupons attached, to ⁴⁸⁹ the amount and of the character set forth in such ordinances; and, when such ordinance is passed, it shall at the next November election be submitted to the qualified voters of the city; and, if it receives assent of two-thirds of those voting the bonds so voted shall be issued by the city and delivered to the board of park commissioners."

This requires the proposition to be submitted at the November election to the qualified voters of the city, "and if it receives the assent of two-thirds of those voting the bonds so voted shall be issued," etc. What is meant by those voting? Clearly those voting at the November election.

The ordinance is still more explicit. It provides:

"Sec. 5. At the November election of 1894 there shall be submitted to the qualified voters of the city of Louisville the question as to whether the city shall issue said bonds, and the said bonds shall not be issued unless at said election two-thirds of those voting shall vote in favor of the issuing of said bonds, as herein provided. In the event that two-thirds of those voting at said election shall vote in favor of issuing said bonds, then the fact that they have done so shall be certified to by the mayor upon said bonds, and the said bonds shall then, but only in that event, be issued by the city and delivered by the mayor to the board of park commissioners of the city of Louisville, to be by the said board of park commissioners used and disposed of for the improvement of lands for park property as provided by law."

This requires the submission at the November election of 1894, and provides that the bonds shall not be issued "unless at said election (i. e., the November, 1894, election) two-thirds of those voting shall vote in favor of issuing said bonds. In the event that two-thirds of those voting at said election (the November election) shall vote in favor of issuing," etc.

490 It is obvious that both the statute and the ordinance require the favorable vote of two-thirds of those voting at the general election.

Judge Landes dissents from that part of this opinion which holds that questions submitted to the people must be submitted at the regular election, being of opinion that the provision in section 157, requiring the assent of two-thirds of the voters "voting at an election to be held for that purpose," requires that there shall be a special election held "for that purpose," and that such special election cannot be held on the regular election day, the words quoted being a mandatory provision otherwise within the meaning of section 148. Judge Landes concurs, however, in the other principles stated in the opinion.

The other questions raised in the record need not be considered.

For the reasons given the judgment is reversed with directions to sustain the demurrer to the first paragraph of the answer and for further proceedings consistent with this opinion.

MUNICIPAL CORPORATIONS—ISSUANCE OF BONDS—SUBMISSION TO VOTERS.—In determining whether the proposition to issue bonds has been carried or not, it is generally proper to take into consideration only those persons who have taken pains to vote upon the question. Persons who do not vote must be deemed to be indifferent as to the result and to leave it to the determination of those who feel sufficient interest to express their will: Monographic note to *Jones v. Camden*, 51 Am. St. Rep. 847, 848.

ELECTIONS—STATUTES REGULATING—WHEN MANDATORY.—Statutory provisions which fix the day and place of the election and the qualification of the voters are mandatory: *State v. Russell*, 34 Neb. 116; 33 Am. St. Rep. 625, and note. See, also, *Brewer v. Davis*, 9 Humph. 208; 49 Am. Dec. 708.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

LOEWEN v. FORSEE.

[187 MISSOURI, 29.]

APPELLATE PRACTICE—FINDINGS.—Under a statute requiring the court, on request, to state a finding of facts in writing separately from the conclusions of law, such findings filed after judgment but as of date thereof are not part of the record nor reviewable on appeal.

STATUTE OF FRAUDS—PAROL AGREEMENT—CONSIDERATION.—A parol agreement between all of the parties that one of two mortgages on the same property shall have priority over the other is not within the statute of frauds, and is based upon sufficient consideration if a loan is obtained thereby.

NEGOTIABLE INSTRUMENTS—ASSIGNMENT—NOTICE OF EQUITIES.—An assignee of purchase money mortgage notes, who takes them with notice of an agreement between the mortgagor, the purchase money mortgagee, and a second mortgagee that the mortgage of the latter shall have priority, takes subject to such agreement, although the assignment was made before maturity of the notes and for value and the purchase money mortgage was first recorded.

NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITIES—EQUITIES.—If a negotiable note is transferred merely as collateral security for a pre-existing debt, and no new consideration is given for it, the assignee takes it subject to all equities existing between the parties to it.

NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY—EQUITIES.—A negotiable note transferred before maturity as collateral security for a pre-existing debt, without any agreement extending the time of payment of such debt, is subject to all equities existing between the original parties to it.

NEGOTIABLE INSTRUMENTS ASSIGNED AFTER MATURITY, though for a valuable consideration, are subject to all equities existing between the original parties.

F. M. Black, Kinley & Kinley, and I. J. Ringolsky, for the appellants.

S. P. Forsee, and Kagy & Bremermann, for the respondents.

32 BURGESS, J. Action by plaintiffs for the removal of a cloud on their title to the south half of lot number 71, Carlton Place, Kansas City, Missouri. The suit was brought in the circuit court of Jackson county, but the venue was subsequently changed to the circuit **33** court of Johnson county, where a trial was had, resulting in a judgment for defendants, from which plaintiffs appealed.

The petition is in two counts.

The first count, leaving off the formal parts, is as follows: "1. That Louis Loewen is husband of plaintiff, Julia Loewen. 2. That Morris Loewen is husband of Ida Loewen. 3. That prior to 1888 defendant W. C. Forsee was the owner in fee simple of lot number 71 in Carlton Place, an addition to the city of Kansas now Kansas City, Jackson county, Missouri. 4. That said defendant, W. C. Forsee, and wife, by warranty deed dated June 14, 1888, recorded July 9, 1888, sold and transferred said property, lot number 71, Carlton Place, to one J. J. Hoos. 5. That afterward said John J. Hoos and wife executed two deeds of trust to Samuel Foster for Charles R. Hicks. Said deeds of trust were dated June 15, 1888, acknowledged June 18, 1888, and filed for record July 9, 1888. One of said deeds of trust covers the north half of said lot 71, and the other the south half of said lot 71, each given to secure a loan of fifteen hundred dollars. 6. That afterward the said J. J. Hoos and wife made and executed a deed of trust to S. S. Forsee, trustee for W. C. Forsee. Said deed of trust is dated June 22, 1888, acknowledged July 6, 1888, and filed for record July 7, 1888. 7. That thereafter, on August 13, 1891, the debts described in each of the deeds of trust executed and given by said J. J. Hoos and wife to Samuel Foster, trustee for Charles R. Hicks, coming due, and default being made in the payment of the same, said deeds of trust were foreclosed, according to the terms and conditions mentioned in the same, and at the foreclosure sale of said property above described, by said trustee, Samuel Foster, the same was purchased by plaintiffs, Julia and **34** Ida Loewen, who paid full value for the same; and said north half and said south half of said lot number 71, Carlton Place, were transferred to said plaintiffs, Julia and Ida Loewen, by said trustee, Samuel Foster, by two trustee deeds, both dated August 13, 1891, and recorded August 20, 1891. 8. Plaintiffs further state that, at the time the trust deeds were made and executed by said J. J. Hoos and wife to Charles R. Hicks and to W. C. Forsee, beneficiary, it was orally agreed by and between said Hoos, said Hicks, and said W. C. Forsee, that the deeds of trust made to Samuel Foster, trustee for Charles R. Hicks,

was to be a first lien on said lot 71, Carlton Place, and it was mutually agreed by all of said parties that the deeds of trust made by said J. J. Hoos to S. S. Forsee, trustee for W. C. Forsee, were to be a second lien on said lot 71, Carlton Place, subject to the two deeds of trust made to Samuel Foster, trustee for Charles R. Hicks.

"Plaintiffs further state that said loans and deeds of trust were all made about the same time, with the understanding and agreement that said trust deeds made to said Charles R. Hicks were to be first liens on said lot described herein, and were to be filed on record first, said trust deeds being given to secure loans made to said Hoos to erect buildings on said lots, which buildings were erected on the same with said loans; and it was also mutually agreed by all parties thereto, in consideration of said Hicks agreeing to and making said loan that said trust deed to S. S. Forsee, trustee for W. C. Forsee, was to be filed in recorder of deeds' office in Jackson county, Missouri, after the filing of said Hicks' trust deeds, and that it should be a lien on said lot, subject to the liens of the Hicks trustee deeds.

"And the plaintiffs further state that the defendant W. C. Forsee, contrary to the express agreement ³⁵ mentioned herein, made with said Hicks and said Hoos, wrongfully and fraudulently, and without the knowledge or consent or acquiescence of the said Samuel Foster or Charles R. Hicks, placed the trust deed executed to him on the records of Jackson county, Missouri, on July 7, 1888, which was on Saturday; the said trust deeds to Samuel Foster, trustee for Charles R. Hicks, not being recorded until July 9, 1888, which was on the following Monday.

"Plaintiffs further state that said trust deed, appearing as filed of record prior to the time of the trust deeds made to Charles R. Hicks, is a cloud on their title to the south half of said lot number 71, Carlton Place; that they are now in the possession of said south half of said lot; that said S. P. Forsee and M. T. Forsee are now claiming an interest and title to said lot through and under said deed of trust, with full notice of the agreement aforesaid, and of the fact that said deed of trust was only a second lien on said land.

"Wherefore plaintiffs pray for a removal of said cloud from their title to said south half of said lot; that said trust deed, so executed to said S. S. Forsee, trustee for W. C. Forsee, be declared subject to the trust deed executed to Samuel Foster, trustee for Charles R. Hicks; and for such other and further relief as plaintiffs may be entitled to in equity under the premises."

The second count is in all respects like the first except that it

is in respect to the north half of the lot, and alleges that defendants are in its possession. The answers are general denials.

The evidence discloses the following facts: On June 22, 1888, the defendant, W. C. Forsee owned all of lot 71, Carlton Place, Kansas City, Missouri, which he sold on that day to one J. J. Hoos at sixty dollars per foot, one-third cash, balance in one and two years from that date, for which Hoos executed to said Forsee four negotiable promissory notes for five hundred dollars each, and to secure their payment he executed to Forsee, on July 6, 1888, a deed of trust on said lot, his wife joining therein with him. A verbal agreement was then entered into between Hoos and W. C. Forsee, by which Hoos was to borrow three thousand dollars, to be applied to the building of two seven or eight room houses, one on the north half and the other on the south half of said lot, to cost fifteen hundred dollars each; and, to enable him to borrow the money for that purpose, it was agreed between them that two mortgages should be given on each half of said lot to secure the payment of fifteen hundred dollars, one on the north half and the other on the south half, which were to be first liens on the property. Hoos secured the desired loan from one Charles R. Hicks, and executed to Samuel Foster, as trustee, two deeds of trust, according to the arrangement with Forsee, to secure its payment, one on the north half and the other on the south half of the lot. Six hundred and seventy-five dollars of the money borrowed by Hoos, to be used in the erection of the buildings, was paid to W. C. Forsee as part of the purchase money for the property, he knowing the purpose for which it was procured. The Hicks deeds of trust were filed for record in the recorder's office of Jackson county on the ninth day of July, 1888. Forsee's deed of trust was recorded July 7, 1888, two days before the Hicks deeds of trust were recorded.

On August 13, 1891, the debts described in the deeds of trust executed by said J. J. Hoos and wife to Samuel Foster, trustee for Charles R. Hicks, coming due, and default being made in the payment of the same, they were foreclosed, according to their terms and conditions, and, at the foreclosure sale of said property by said trustee, Samuel Foster, the same was purchased by plaintiffs, Julia and Ida Loewen, who paid full value for the same, and said north half and said ⁸⁷ south half of said lot number 71, Carlton Place, were transferred to the said plaintiffs, Julia and Ida Loewen, by said trustee, Samuel Foster, by two trustee's deeds both dated August 13, 1891, and recorded August 20, 1891.

The evidence was somewhat conflicting as to the terms of the agreement between W. C. Forsee, Hoos and Hicks, with respect

to the terms and conditions, if any, by which Hicks' deeds of trust were to be first liens on the property—plaintiffs contending that there were none, while defendants contend that the condition was that Hoos was to keep the property entirely free from mechanics' liens, and that he did not do so. But the decided weight of the evidence showed that there were no conditions, and that the agreement was solely for the purpose of enabling Hoos to borrow money on the lots with which to construct the buildings.

Plaintiffs were, at the commencement of this action, in the possession of said south half of said lot, and defendants were in the possession of the north half.

The deed of trust, made by said Hoos to said Forsee, was made to secure four negotiable promissory notes, each for the sum of five hundred dollars. The first of said notes falling due was transferred by indorsement for value, before maturity, to said M. T. Forsee, to secure an antecedent debt, and the other three were transferred to said M. T. Forsee, after due, for value, to secure debts contracted at the time, and upon the faith thereof. Said M. T. Forsee had no notice or knowledge of said agreement as to the priority of the liens of said deeds of trust.

Afterward, at a sale made under the deed of trust last named, according to the terms thereof, the said M. T. Forsee became the purchaser of the whole of ^{ss} said lot 71, and received a deed from the trustee therefor.

Waiving all objections as to the sufficiency of the petition, we dispose of the case according to the facts and circumstances in proof.

Both parties requested the court to make a special finding of facts in writing, separate from the judgment, in accordance with section 2135 of the Revised Statutes of 1889, which is as follows: "Upon the trial of a question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the questions of law or equity arising in the case, in which case the court shall state in writing the conclusions of facts found separately from the conclusions of law."

The record discloses that the judgment was rendered December 18, 1893, and that, while the court made a special finding of facts, as requested by the parties, it was not filed until the 19th of February, 1894, but was then by an entry of record ordered to be filed as of December 18, 1893.

Defendants insist that, as the finding of facts was made at the request of the parties, any objection thereto was matter of ex-

ception, and, as no exception was taken to it by plaintiffs, it is conclusive upon them.

This contention would doubtless be correct if the finding of facts had been filed before or at the rendition of the judgment; but it is inconceivable how plaintiffs could have been expected to except to the finding when it was not filed before or at the time of the rendition of the judgment, nor even within the time that they were required by statute to file their motion for a new trial. They had no means of knowing what the finding would be, and were not required to anticipate ³⁹ that anything set forth in it would be contrary to what they understood to be shown by the evidence.

It was held by this court in *Hamilton v. Armstrong*, 120 Mo. 597, that a finding of facts after judgment has been rendered does not constitute a part of the record, and will not be reviewed on appeal. A similar ruling was made by the supreme court of Iowa, under a similar statute, in *Hodges v. Goetzman*, 76 Iowa, 476.

There was no such finding of facts in this case as contemplated by statute, or as can be considered by this court, other than such as may be incident to the result of the judgment. No point is made by plaintiffs on the failure of the court to make a finding of facts in writing before or at the time of the rendition of its judgment, nor was any exception taken for that reason.

The evidence clearly showed that, by verbal agreement between Hicks, Forsee, and Hoos, Hicks' two deeds of trust were to be first liens on the lot. This is not only shown by the evidence, but comports with the methods usually adopted by men of ordinary prudence and business capacity. It was absolutely necessary for Hoos to borrow money to enable him to construct buildings on the lot according to his agreement with Forsee, and it is hardly to be presumed that he could have done so with a first mortgage lien in existence on the lot to secure the payment of the purchase money. No one would have loaned him the necessary amount for that purpose under such conditions. Therefore, in order that he might effect the loan, and pay Forsee from it six hundred and seventy-five dollars on the purchase price, Forsee agreed that Hicks' trust deeds should be first liens on the lot. There were no conditions to this agreement, as the facts and circumstances in evidence plainly show.

But it is contended that the contract by which the deeds of trust for the benefit of Hicks were to have ⁴⁰ priority over the mortgage in favor of Forsee, not being in writing, is within the statute of frauds, and void.

It was held in *Linville v. Savage*, 58 Mo. 248, under like circumstances, that parol proof "is not obnoxious to the imputation of seeking by parol to modify or change the construction of a written instrument; but to show that one of two instruments was understood by both parties to them to have a priority over the other," and, if it were not so, it was either a mistake or a fraud, and parol evidence was admissible to show either. So, in *Rigler v. Light*, 90 Pa. St. 235, in which it was agreed between the parties thereto that one of two mortgages executed at the same time should be the prior lien, it was held that the agreement would be enforced as between the parties, although the mortgage postponed was first recorded. In *Maze v. Burke*, 12 Phila. 335, it is held that such an agreement may be proved by parol: See, also, *Freeman v. Schroeder*, 43 Barb. 618; 1 Jones on Mortgages, 4th ed., sec. 608.

The loan of the money to Hoos by Hicks, under the agreement with Forsee, by which his (Forsee's) deed of trust should be secured second in order, as a lien, to the deeds of trust for the benefit of Hicks, was a sufficient consideration for the agreement. It therefore necessarily follows that, if Mrs. Forsee had notice of this agreement at the time she became the owner of the notes, even though for a valuable consideration, and before their maturity, her rights must be postponed to those of plaintiffs, because of their superior equity, and because it would be a fraud upon them, holding, as they do, under the Hicks deed of trust, to permit her, under such circumstances, to assert that the deed of trust to or for the benefit of her husband, under which she claims title, was the prior lien on the ⁴¹ lot, and that the sale thereunder and purchase by her passed to her the legal title.

It is not claimed that the notes are without consideration, or that there existed at any time any legal defense thereto, but it is insisted that she was not an innocent purchaser of the notes, and that she holds them subject to any agreement between her husband, W. C. Forsee, Hoos, and Hicks, by which the deed of trust, given to secure them was to be postponed to the deeds of trust for the benefit of Hicks.

At the time the first note was transferred to Mrs. Forsee by her husband, W. C. Forsee, it was not then due; nor did it become due for six months thereafter. The weight of the evidence showed that at the time of the transfer her husband was indebted to her in the sum of five hundred dollars on account of moneys belonging to her, which she received from her father's estate and which her husband made use of, and that he transferred the note to her to secure the payment of that indebtedness, and not in satisfac-

tion of it. There was no express agreement between Mrs. Forsee and her husband as to the time when the original debt should be paid, either before or at the time of the transfer of the collateral to her.

Under such circumstances, there is some confusion among the decisions of the supreme court as to whether or not she was a holder for value of the collateral, and took it free from all defenses against it of which she had no notice, or whether she took it subject to all equities existing between the original parties thereto.

In *Goodman v. Simonds*, 19 Mo. 107, it was held that, where a negotiable note is transferred merely as collateral security for a pre-existing debt, and no new consideration is given for it, the assignee takes it subject to all equities existing between the parties to it. The rule announced in that case was recognized in *Logan v. Smith*, 62 Mo. 455; *Davis v. Carson*, 69 Mo. 43 609; *Skilling v. Bollman*, 73 Mo. 665; 39 Am. Rep. 537; again in *Deere v. Marsden*, 88 Mo. 512, and still later in *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745. It was recognized by the courts of appeals in *Terry v. Hickman*, 1 Mo. App. 119; *Brainard v. Reavis*, 2 Mo. App. 490; *Hodges v. Black*, 8 Mo. App. 394; *Feder v. Abrahams*, 28 Mo. App. 454; *Conrad v. Fisher*, 37 Mo. App. 352; *Wells v. Jones*, 41 Mo. App. 1; and in *Napa Valley Wine Co. v. Rinehart*, 42 Mo. App. 171.

A contrary rule was announced in *Grant v. Kidwell*, 30 Mo. 455, in which it was held that the indorsee of a negotiable promissory note, assigned before maturity as collateral security against an antecedent liability, takes it discharged of prior equities. While no reference is made in this case to *Goodman v. Simonds*, 19 Mo. 107, it is in direct conflict with the ruling in that case.

In *Boatman's Sav. Inst. v. Holland*, 38 Mo. 49, it is said: "A pre-existing debt, or an antecedent liability, incurred by an indorsee of a negotiable promissory note assigned before maturity, is a sufficient consideration to support the title of such indorsee."

There are, however, many late authorities which hold that the transfer before maturity by indorsement in writing, as in this case, of a negotiable note as security for an antecedent debt merely, without more, makes the indorsee a bona fide holder unaffected by equities between the original parties of which he had no notice: *Railroad Co. v. National Bank*, 102 U. S. 14; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620; *Giovannovich v. Citizens' Bank*, 26 La. Ann. 15; *Harrison v. Pike*, 48 Miss. 46; *Mix v. National Bank*, 91 Ill. 20; 33 Am. Rep. 44. Indeed, such seems to be in accord with the decided weight of authority.

But the greater number of decisions of the appellate courts of this state, as well, also, as the more recent decisions, are in accord with the rule announced ⁴³ in *Goodman v. Simonds*, 19 Mo. 107, and that enunciation must be regarded as the settled law of this state.

As has been said, there was no express agreement on the part of Mrs. Forsee to forbear suit until the collateral matured, and in such circumstances it was said: "As to a pre-existing debt, if there is an express agreement on the part of the creditor to forbear suit until the collateral shall mature, the agreement to delay constitutes the transferee a holder for value. . . . The extension of time for the payment of the past indebtedness, if for a day only, constitutes a new and sufficient consideration": *Deere v. Marsden*, 88 Mo. 512; see 1 *Daniel on Negotiable Instruments*, 4th ed., 829 a; *Oates v. National Bank*, 100 U. S. 247; *Smith v. Worman*, 19 Ohio St. 148.

Had the note been taken by Mrs. Forsee in satisfaction of the indebtedness of her husband to her, and without notice of the existence of the agreement between her husband and Hicks by which the latter's deed of trust was to have preference over that of her husband, the note would not be subject in her hands to any equitable defenses existing between the original parties thereto. In *Fitzgerald v. Barker*, 96 Mo. 661, 9 Am. St. Rep. 875, it was held that the transferee of a negotiable note, who accepts the same before maturity in satisfaction of a pre-existing debt, will be regarded as an innocent purchaser for value. But in the absence of an agreement between Mrs. Forsee and her husband by which the note was to be taken in satisfaction of her husband's then indebtedness to her, or for an extension of time for the payment of the original indebtedness to her, in consideration of the assignment of the note, it follows that she took the note first transferred to her subject to all equities which existed between the original parties thereto with respect to the note.

When the other note was assigned to Mrs. Forsee it was more than twelve months overdue, and, even ⁴⁴ though she paid a valuable consideration for it at the time of its assignment to her, she took it subject to all equities existing between the original parties thereto.

The deed of trust, given by Hoos on the lot, securing the payment of these notes, passed to Mrs. Forsee as incident to them, and, while she testified that she knew nothing about the arrangement between her husband, Hoos, and Hicks, by which the deed of trust securing the payment of the notes held by her were to be postponed to the deeds of trust under which plaintiffs claim title.

the law charges her with all equities existing between the original parties to the notes, because in the one instance she took the note as collateral security for an antecedent debt, and in the other after it became due.

The judgment is reversed and the cause remanded.

Gantt, P. J., and Sherwood, J., concur.

NEGOTIABLE INSTRUMENTS—HOLDERS OF, AS COLLATERAL SECURITY—EQUITIES.—The holder of negotiable paper as collateral security for a pre-existing debt is not a bona fide holder for value, nor entitled to protection against equities and defenses existing between prior parties of which he had no notice: *Vann v. Marbury*, 100 Ala. 438; 46 Am. St. Rep. 70, and note. It is otherwise, however, if he parts with new consideration: *Ruddick v. Lloyd*, 15 Iowa, 441; 83 Am. Dec. 423, and note; *Roxborough v. Messick*, 6 Ohio St. 448; 67 Am. Dec. 346. But upon this question there is a conflict of judicial opinion: Note to *Roxborough v. Messick*, 67 Am. Dec. 352. See, also, *Crump v. Berdan*, 97 Mich. 293; 37 Am. St. Rep. 345, and note; *Rosemond v. Graham*, 54 Minn. 323; 40 Am. St. Rep. 386, and note. If the note is transferred after maturity in pledge as collateral security, the indorsement is not one which is protected as a commercial indorsement for value: *Jenness v. Bean*, 10 N. H. 266; 34 Am. Dec. 152; *Davis v. Noll*, 38 W. Va. 66; 45 Am. St. Rep. 841, and note.

APPEAL—RECORD ON.—It is a general rule that the appellate court, in reviewing evidence, cannot go outside of that presented in it in the record on appeal: *Tarver v. Torrence*, 81 Ga. 261; 12 Am. St. Rep. 311; *Winston v. Burnell*, 44 Kan. 367; 21 Am. St. Rep. 289; *Lane v. Dorman*, 8 Scam. 238; 36 Am. Dec. 543, and note. Papers not copied into the bill of exceptions, or so specifically referred to as to leave no reasonable doubt of their identity, will not be noticed on appeal though copied into the record: *Hatch v. Potter*, 2 Gilm. 725; 48 Am. Dec. 88; *Pickett v. Doe*, 5 Smedes & M. 470; 43 Am. Dec. 523.

EPHLAND v. MISSOURI PACIFIC RAILWAY COMPANY.

[137 MISSOURI, 187.]

MASTER AND SERVANT—LIABILITY FOR TORTS OF SERVANT—SCOPE OF EMPLOYMENT.—While a master is liable only for such wrongs of his servant as are committed in the course of the employment and for the master's benefit, yet the scope of such employment may be implied from its nature and the end to be accomplished.

RAILROADS—LIABILITY FOR ACT OF EMPLOYEE.—A railroad company is liable for an injury received by a passenger in jumping from a moving train, when such act is induced by the terrifying acts and exclamations of a brakeman made in the car in which such passenger is traveling, and from which the latter might reasonably infer that a wreck of the train or great danger was imminent, although such brakeman had no express duty to perform in or about the car or in directing the passengers.

INSTRUCTIONS—ADMISSIONS OF FACT.—An instruction, that plaintiff's testimony against his own interest is to be taken as true should not be given unless facts material to the issue have been admitted.

R. T. Bailey and L. O. Hocker, for the appellant.

Graves & Clark, for the respondent.

191 **MACFARLANE, J.** This action is for damages on account of bodily injuries sustained by plaintiff on account of the alleged negligence of defendant.

The case has been twice tried, each trial resulting in a judgment for plaintiff. On appeal the first judgment was reversed by the Kansas City court of appeals: *Ephland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147. Defendant also appealed from the second judgment to the same court, and the case was certified to this court; the opinion, which resulted in an affirmance of the judgment, and which was agreed to by a majority of the court of appeals, being deemed by one of the judges to be in conflict with certain decisions of the supreme court.

192 Only one point is insisted upon by defendants as ground for reversal, and the facts need only be briefly stated: Defendant operates a railroad from Butler, south. On the morning of the twelfth day of March, 1892, it ran a mixed train out of Butler on said road. The train was composed of some freight-cars, a combination car for carrying passengers, their baggage, and the mail, and a caboose for the convenience and accommodation of the trainmen. The last named was the end car of the train, and, by permission of the company, was used by passengers for a smoking-car.

It was constructed in the usual manner, with a cupola in the front end. The brake ran up into the cupola on the right or west side, near which a seat for the rear brakeman was provided. The cupola on the left side was provided with two seats—one for the conductor, and the other for the use of the other brakeman when not actually engaged in his duties on the train. The car was designed for use in freight trains. From the seats in the cupola the movements of the train could be observed by the conductor and brakeman. The position of the brakeman in charge of the brakes was in view of the passengers, but the two seats on the opposite side were not.

The train on this morning was in control of a conductor, and he had under him two brakemen, named Lamb and Little. The duties of the latter were on the hind end of the train, and his proper position while the train was moving was at the brake in the cupola. Lamb is denominated by the witnesses as a "swing brakeman." His duties, as defined by the conductor, were to take charge of the train, and do the switching, in the conductor's absence.

The conductor testified: "When we arrive at a station, the station agent has a switch list which he ¹⁰³ gives the conductor, and the bills which are to go, and gives the switch list to the swing brakeman, and while the conductor attends to the other part in loading freight, and, if he gets car out, to go; the swing brakeman does this with the assistance of the front brakeman." This brakeman had no duty to perform in the caboose; had nothing to do with directing passengers or calling out stations.

On starting the train from Butler, Little took his proper position at the brake in the cupola, on the west side. The conductor and brakeman Lamb occupied the cupola on the left or east side. These positions were retained until the occurrence of the circumstances in which plaintiff was injured. Plaintiff and three other persons were passengers riding in the caboose.

In order to fairly present the question for decision, the foregoing facts are assumed to be true, though the evidence is conflicting as to whether brakeman Lamb or Little was at the brake on the right side of the cupola.

After the train had run two or three miles south, a single short blast of the whistle was sounded by the engineer. This signal meant that the train must be stopped, and called for the assistance of the brakemen. On hearing this signal, it became the duty of the brakeman to promptly apply the brakes.

The evidence tends to prove that, on hearing this signal, Little commenced turning the brake in the cupola, which, in taking up the slack in the chain, made a rattling noise, and brakeman Lamb shouted, in an excited voice, "Jump off!" "Jump for your lives!" or words of similar import, and himself came hastily down from the cupola, and ran through the car and out at the front door.

¹⁰⁴ This exclamation and action of Lamb excited the passengers in the caboose, and one of them called out, "Let us get out of here," or words to that effect, and ran and jumped from the rear end of the car. Plaintiff followed, and also jumped off, the car being at the time in rapid motion, and received the injuries for which he claims damages in this suit.

Counsel insist that Lamb, when making the negligent exclamation and act, was not acting in the line of his duty, or within the scope of his authority, and defendant is not, therefore, answerable for the damage resulting therefrom.

A number of errors are assigned by appellant, but one only is now insisted upon. It resolves itself into this: Is a railroad company, while running a train designed for carrying both freight and passengers, answerable for damage resulting to a pas-

senger from jumping from the train on account of the negligent and terrifying acts and exclamations of one of the brakemen, made in the car in which he was being carried, and from which he might reasonably infer that a wreck of the train was imminent, though such brakeman had no express duty to perform in or about such car, or in the direction of passengers?

There can be no doubt of the correctness of the abstract proposition of law invoked by counsel—that the master is only answerable for the wrongs of his servant which are committed in the course of the service, and for the master's benefit. But the scope of a servant's duties may be implied from the nature and circumstances of the employment and the end to be accomplished.

Defendant was a carrier of passengers, and its duty to those carried required great care in the running and management of its trains. Lamb was employed as a brakeman on the train. It is true, the expressed duties ¹⁹⁵ required of him were limited, and did not include that of directing passengers, or of managing the passenger cars. Under ordinary circumstances, it may be agreed that he had no implied authority to perform such duties. But he was employed to assist in accomplishing the end the master had in view, namely, the safe carriage of the passengers and freight intrusted to its care.

A brakeman would certainly have the implied authority, in order to save a train and the passengers, to set brakes, or perform any other duty, though not in the ordinary course of those expressly assigned to him. Had a wreck of the train really been imminent, and passengers could have been saved by timely warning, who can doubt the duty and authority of anyone employed upon the train to assist in its management, to give the warning? This would be a duty, not merely of humanity, which all humane persons would perform, but a duty to the master, and in furtherance of his business. In such an emergency, in which the avoidance of the threatened danger required prompt action, a brakeman who discovered the peril would surely not be required to hunt up the employé who was expressly authorized to direct passengers in order that the warning might be regularly given.

If, in case of such an emergency, any brakeman on the train could, in the name of the company, give the passengers warning of the danger, they would have the right to rely and act upon such warning. It could make no difference that no real danger was imminent, as in this case. If the brakeman had authority to give the warning in case of actual danger, the passengers had the right to rely and act upon one, though there was really no danger and he had in fact no good reason for apprehending it.

¹⁹⁶ While the terrifying acts and exclamations of Lamb may not have been done in the ordinary course of his employment, it was, in the circumstances, within the scope of his employment, and plaintiff had the right to act upon them; and defendant is answerable for the results, unless, in acting, plaintiff was himself negligent.

It is said in 1 Shearman and Redfield on Negligence, section 148: "The act causing the injury must have been one within the scope of the authority which the servant had from the master, or which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have, or which third persons have a right to infer from the nature and circumstances of the employment."

This ruling we do not think in conflict with the general rule before announced, or the numerous decisions of this court, applying it to particular facts.

In case of emergency, in which the lives of passengers and the destruction of property are threatened and the danger is imminent, the nature and purpose of the employment of a brakeman implies the duty to give aid, whenever necessary, in preventing the threatened disaster, and, in circumstances of peril, fright, and panic, passengers have the right to rely on his directions. The scope of authority is determined from the general nature of the employment, and the emergency calling for its exercise, as shown by the evidence in the particular case. We know of no contrary ruling of this court under the same or similar circumstances.

The judgment of the court of appeals is affirmed.

All concur.

ON MOTION FOR REHEARING.

MACFARLANE, J. On motion for rehearing, counsel for defendant insists, in effect, that any waiver of other ¹⁹⁷ errors than the one considered in the foregoing opinion was intended to apply only to the submission of the case in the Kansas City court of appeals.

The court's error in considering the waiver as general was a natural one, inasmuch as the case was submitted to this court, without argument, upon the briefs filed in the court of appeals.

The chief complaint now made is the refusal of the court to give instruction 5 asked by defendant, which is as follows: "If the jury believe from the evidence that William Lamb was not in the west cupola, nor at the brake, from the time the train left Butler until the accident complained of, your verdict must be for the defendant."

The legal proposition involved in this instruction is, that if brakeman Lamb was not at the brake, or, in other words, if he had no duty to perform in the car, defendant is not answerable for his negligent exclamations. Without setting out the instruction, on account of criticisms made to its form, we undertook, in the opinion, to answer the legal question. We are still satisfied with the conclusion reached, viz., that if Lamb was employed by defendant as a brakeman to assist in operating the train, in the circumstances shown, defendant should answer for his negligence, and it would make no difference what his local position in the car may have been, or whether he had any duty to perform therein or not. In the opinion we assume that Lamb was not at the brake, and the question was fairly considered. The instruction, for the reason given in the opinion, was properly refused.

What is said in the opinion is also a sufficient answer to the objection now urged to the ruling of the court in refusing defendant's demurrer to the evidence. ¹⁹⁸ But see, also, companion case of *McPeak v. Missouri Pac. Ry. Co.*, 128 Mo. 648, opinion by Gantt, J.

Defendant asked the court to instruct the jury that, "what plaintiff testified to against his own interest is to be taken as true." The instruction was refused by the court, and counsel assigns its action as error.

The admissions of plaintiff while testifying as a witness, to the truth of which counsel wish to conclude him, all relate to the duty of brakeman Lamb, and the liability of defendant for his acts and exclamations. He admitted while testifying that he did not know that Lamb was at the brake, or set the brake, nor was he certain of the exact words of the exclamation. To conclude a party to a suit to the truth of all the facts he admits while testifying that he does not know, unless knowledge is material, would be a rather harsh rule. But, as held in the opinion, it made no difference whether Lamb was at the brakes or not, and, therefore, the knowledge of plaintiff could make no difference, and an affirmative admission of want of knowledge would be wholly immaterial.

We do not think there were any admissions of plaintiff, while testifying, that authorized giving the instruction. Such instructions should not be given unless facts material to the issue have been admitted.

After a careful consideration of all grounds insisted upon for a rehearing, we conclude that all are fairly answered by the opinion. The motion is overruled.

All concur except Robinson, J., who is absent.

MASTER AND SERVANT—LIABILITY FOR TORT OF SERVANT—SCOPE OF EMPLOYMENT.—The old rule that the master was never liable for the wilful or malicious act of his servant is not now the law. He is answerable if the act was done in his master's business, and this is the true test of his liability: *Richberger v. American Exp. Co.*, 73 Miss. 161; 55 Am. St. Rep. 522, and note. It is the character of the employment, and not the private instructions given by the master to the servant, that must determine his liability: Monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 62. What is the scope of a servant's employment may be determined by implication from the circumstances of the case: Monographic note to *Ware v. Barataria etc. Canal Co.*, 85 Am. Dec. 192.

INSTRUCTIONS AS TO EVIDENCE.—The court cannot instruct upon the weight of evidence or the credibility of witnesses: *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859, and note. But a charge which ignores any material, conflicting, or qualifying evidence, or a material fact which is the legitimate inference of other proven facts, is misleading and erroneous: *Boyd v. Jones*, 96 Ala. 305; 38 Am. St. Rep. 100.

BUTZ v. CAVANAUGH.

[137 MISSOURI, 503.]

NEGLIGENCE—PROXIMATE CAUSE—TRESPASSER.—If one voluntarily goes into an excavation on private property near a street and is injured thereby, the fact that the street is in a dangerous condition at that place is not the proximate cause of the injury.

MUNICIPAL CORPORATIONS, LIABILITY FOR NUISANCE—ORDINANCES.—A city is not liable for injuries to private persons resulting from a failure to enforce its police regulations which provide for the prevention and abatement of nuisances.

NUISANCE—DANGEROUS PREMISES.—A landowner in a city who fails to fill, or fence, or inclose by a wall, a dangerous excavation on his premises adjoining the street as required by ordinance, is liable for injuries resulting to a stranger therefrom.

NUISANCE—DANGEROUS PREMISES—TRESPASSER.—A landowner in a city who fails to fill or inclose a dangerous excavation on his premises, as required by an ordinance, is not liable in damages for an injury to an intelligent boy twelve years of age, who, contrary to the warning of his father, becomes a trespasser by voluntarily going into such excavation.

W. C. and J. C. Jones and C. C. Kidd, for the appellant.

W. C. Marshall and Lubke & Muench, for the respondents.

508 **MACFARLANE, J.** Plaintiff, a minor, by his next friend, prosecutes this suit to recover of defendants damages on account of having his feet badly burned by reason of the alleged negligence of defendants. The defendants are Timothy Cavanaugh, the owner of an old rock quarry, the Cavanaugh Construction Company, a corporation, and lessee of said quarry, and the city of St. Louis.

An old quarry about sixty feet deep, and about one block in area, constitutes the dangerous property complained of. The

property was surrounded on the east by Glasgow avenue, on the south by Madison street, on the west by Garrison avenue, and north by Magazine street. The wall of the quarry on Harrison avenue was nearly perpendicular, and was protected by a fence. Magazine street was only partially improved. From this street the quarry was used, by authority of the defendants, as a public dumping place for all kinds of debris gathered from streets, alleys, and backyards. This was burned, and there were frequently smouldering fires therefrom. Along this street into the quarry ⁵⁰⁰ the banks were steep but sloping. Generally, a watchman was kept at this dump to direct the unloading of the debris thrown into it. There was no fence or other protection on this the south side of the quarry. Boys sometimes visited this dumping place to look for cans, wire, and other articles thrown out there.

On the ninth day of September, 1893, plaintiff was twelve years of age, and lived with his parents about two blocks south of the quarry. He had about two weeks before been warned by his father not to go about the dump, as he was liable to get burned. On said day he and two companions were on Magazine street about its junction with Garrison avenue, and he saw, about the bottom of the embankment, some wire which he concluded to get. He ran down the embankment and about two-thirds of the way down stepped both feet into a smoldering fire, or hot ashes, and, being barefooted, his feet were severely burned. The watchman was not present. These, briefly stated, are the facts developed at the trial.

Certain ordinances of the city were read in evidence defining nuisances and providing for their abatement, and requiring holes and other dangerous places to be properly inclosed with fences or walls. Two sections of these ordinances read as follows:

"Sec. 619. All holes, depressions, excavations, or other dangerous places within the city of St. Louis that are below the natural or artificial grades of the surrounding or adjacent street shall be properly inclosed with fences or walls, or be filled up so as to prevent persons or animals from falling into them."

"Sec. 620. The street commissioner shall notify the owners or occupants of premises upon which such dangerous places exist to cause fences or walls to be built around them, or to cause the same to be filled up, within such period as he may deem the exigencies of ⁵¹⁰ the case may require. In case of failure to comply by any of the owners or occupants of said premises, after the notification above required has been given, then they shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be

fined before the police court not less than ten nor exceeding five hundred dollars."

The owner and lessee of the property are charged with negligence in maintaining a nuisance in a populous portion of the city, in failing to fence the quarry, and in permitting it to be used in such a manner as to attract children into a place of danger from hidden fires. The city is charged with negligence in permitting a nuisance on the street and in not requiring the hole to be fenced.

After hearing the evidence of plaintiff, on intimation from the court that a demurrer to the evidence would be sustained, plaintiff took a nonsuit with leave. A motion to set aside the nonsuit was overruled, and plaintiff appealed.

Plaintiff was not injured by falling into a dangerous excavation on the street. When injured he was on private property some distance from the street, where he went voluntarily. Though the street may have been in a negligently dangerous condition, that was not the proximate cause of the injury. The city cannot, therefore, be held responsible for the injury on the ground of neglect to keep the street in proper condition.

Nor can the city be held responsible for injuries to private persons resulting from a failure to enforce its police regulations, which provide for the prevention and abatement of nuisances: *Harmon v. St. Louis*, 137 Mo. 494; 2 *Dillon on Municipal Corporations*, 4th ed., sec. 951. As to the city, the judgment was clearly right.

⁵¹¹ 2. Section 619 of the ordinances requires all such holes and depressions as the one in question to be "inclosed with fences or walls, or to be filled up, so as to prevent persons or animals from falling into them."

The ordinance thus prescribes, as a police regulation, a duty to be performed by persons owning such dangerous property. A failure to comply with the requirements of the ordinance would be a breach of duty to the public for which one injured because of it could recover the damages sustained.

This liability has been often declared in actions for damages resulting from a failure to observe the requirements of ordinances regulating the operation of trains in cities. Such breach of duty is held by this court to constitute negligence per se. It, at least, with the resulting injury, makes a prima facie right to recover.

In the case of *Harmon v. St. Louis*, 137 Mo. 494, decided at this term, by court in bank, it was held that one who builds a wooden structure in the city contrary to an ordinance prohibiting the erection of such buildings, is liable to respond in damages to anyone specially injured thereby.

The general rule, in the absence of express law, is, that one is not required to fence or otherwise secure his private property for the protection of strangers, unless the dangers therefrom are so near a public highway as to threaten the safety of persons exercising ordinary care in using the way: *Overholt v. Vieths*, 93 Mo. 424; 3 Am. St. Rep. 557; *Witte v. Stifel*, 126 Mo. 303; 47 Am. St. Rep. 668.

But in case a statute, or valid ordinance, requires the owner to take such precaution, and he neglects or refuses to do so, the unprotected property becomes a public nuisance, and the owner will be liable as for maintaining a nuisance on his premises: *Harmon v. St. Louis*, 137 Mo. 494.

⁵¹² But this ordinance is in derogation of a common right, and a failure to comply with its requirements should not be treated as a license to voluntary trespassers to go upon the property at will. It was evidently intended to protect those only who were lawfully using the public streets, and not those who voluntarily leave the street and go upon the property for their own convenience or pleasure. A fence would be no protection against such persons.

These last remarks may not apply to persons non sui juris who may wander upon the property, but we do not regard plaintiff as such a person. He was an intelligent, active lad of twelve years, who had been warned by his father of the danger of going into the excavation. He must be taken as voluntarily assuming the risk of injury in going down the dump. The attraction of a piece of wire does not excuse the trespass.

The judgment is affirmed.

All the judges of this division concur.

REAL PROPERTY—DANGEROUS PREMISES—LIABILITY OF OWNER.—The owner of a vacant lot upon which is situated a pond of water or a dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon such premises, not by his invitation, express or implied, but for purposes of amusement, or from motives of curiosity: *Moran v. Pullman Palace Car Co.*, 134 Mo. 641; 56 Am. St. Rep. 543, and note; monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416. See, also, *Lowe v. Salt Lake City*, 13 Utah, 91; 57 Am. St. Rep. 708, and note. But one who neglects to perform a specific duty imposed upon him by statute or municipal ordinance, for the protection or benefit of others, is liable to those for whose protection or benefit it was imposed for any injury of the character which the statute or ordinance was designed to prevent, and which was proximately produced by such neglect: *Osborne v. McMasters*, 40 Minn. 103; 12 Am. St. Rep. 698, and note.

MUNICIPAL CORPORATIONS—FAILURE TO ENFORCE ORDINANCE—LIABILITY.—A city is not liable in damages for injury to persons resulting from a failure to enforce ordinances re-

quiring excavations and depressions in city lots adjacent to the highway or street to be filled or fenced by property owners: *Moran v. Pullman Palace Car Co.*, 134 Mo. 641; 56 Am. St. Rep. 543, and note. A city is not liable for failure to enact or to enforce proper ordinances: *Wheeler v. Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837, and note. See *Love v. Atlanta*, 95 Ga. 129; 51 Am. St. Rep. 64; *O'Rourke v. Sioux Falls*, 4 S. Dak. 47; 46 Am. St. Rep. 700, and note.

NEGLIGENCE—PROXIMATE CAUSE.—Negligence is not the proximate cause of an accident, unless, under all the circumstances, it might have been reasonably foreseen by a man of ordinary intelligence and prudence: *Huber v. La Crosse etc. Ry. Co.*, 92 Wis. 636; 58 Am. St. Rep. 940, and note; *Wood v. Pennsylvania R. R. Co.*, 177 Pa. St. 306; 55 Am. St. Rep. 728, and note. See monographic note to *Gilson v. Delaware etc. Canal Co.*, 86 Am. St. Rep. 807-848.

SHORT v. TAYLOR.

[187 MISSOURI, 517.]

APPELLATE PRACTICE—REVIEW IN EQUITY CASE.—The supreme court of Missouri has constitutional power to review the facts as well as the law in a suit in equity, but, if any finding of fact depends on the credibility of witnesses, the court should be satisfied that the finding is against the preponderance of evidence before disturbing it.

APPELLATE PRACTICE.—JUDGMENTS in equity as well as at law should not be reversed unless the reviewing court believes that error has been committed against the complaining party which materially affects the merits of the action.

PARTNERSHIP—ACCOUNTING—PLEADING.—In an action for an accounting between partners, an allegation of partnership is not admitted by a failure to deny it under oath.

JUDGMENTS BY CONSENT of the parties or upon their stipulation should be accorded the same force as other judgments.

JUDGMENTS—EVIDENCE TO ASCERTAIN EXTENT OF.—If the extent of an adjudication does not appear by the record, the proceedings may be looked into by the aid of extrinsic evidence for the purpose of ascertaining the matter actually involved in the decision, so far as such inquiry is not in conflict with the recitals or purport of the record.

JUDGMENTS—RES JUDICATA.—A judgment is conclusive on the parties in a subsequent litigation, as to an issue necessarily decided by the former, although no specific finding may have been made on that issue.

JUDGMENTS—RES JUDICATA—PARTNERSHIP ACCOUNTING.—If an action calling for a partnership accounting is decided on a stipulation to abide the result of another action between the parties involving the issue of partnership between them, but the judgment on the stipulation does not call for an accounting nor contain any finding in relation thereto, it is not a bar to a subsequent action between the same parties for a partnership accounting.

JUDGMENTS—RES JUDICATA—EXISTENCE OF PARTNERSHIP.—A judgment declaring the existence of a partnership is conclusive of that fact as of the date of the judgment in a subsequent suit between the same parties, but it is not conclusive of a partnership at an earlier date than that involved in the issues covered by such judgment.

APPELLATE PRACTICE—WAIVER OF OBJECTION—REPORT OF REFEREE.—If the report of a referee requires a party, on settlement of partnership affairs, to account for the value of certain property claimed by him as his own, he cannot complain of such report on appeal, if he has taken no steps in the court below to place the property at the disposal of the partnership. In such case, he elects to retain the property and to account for its value, and waives the right to object to the referee's report.

PARTNERSHIP—MORTGAGE—EVIDENCE.—The fact that one partner gave a mortgage to his copartner does not prevent the former from showing that such transaction was but part of an agreed plan to put the ostensible title in himself, while the mortgagee was to become an entirely dormant partner.

Draffen & Williams and S. Boyd, for the appellant.

S. Davis and L. Orear, for the respondent.

521 **BARCLAY, P. J.** The case is for an account between the parties to the suit as partners and for judgment for plaintiff's share. The defenses consist of a denial of the alleged partnership and a plea of a former adjudication of plaintiff's claim.

The cause went (without objection) to referees for trial of all the issues and a statement of the account.

The plaintiff's testimony tended to prove that in 1882 the defendant, Mr. William M. Taylor, and Mr. Holmes were partners and owners of a flourmill in Saline county; that about the last of February of that year, plaintiff, Mr. L. D. Short, purchased the interest of Holmes, and entered into equal partnership with 522 defendant in the same enterprise. The former owners made a deed of the property outright to plaintiff, who gave back to Mr. Taylor three notes, of five hundred dollars each, payable at intervals of a year, and secured by deed of trust on the mill property.

One of the terms of the partnership, according to plaintiff's version, was that the business should go forward in the name of plaintiff, and that the defendant should not be known to the public as a partner. The defendant denies the partnership. But (for reasons that will appear later) it is not necessary to set forth the evidence on either side bearing on that issue.

The mill was conducted for a number of years under the arrangement described by plaintiff. During that time a variety of monetary dealings occurred between plaintiff and defendant, as well as between plaintiff and outside parties treating with him in regard to the firm's affairs.

In 1888 defendant brought two actions on the proceedings of which the plea of res judicata in this case is based. The first of those actions was begun by Mr. Taylor against Mr. W. H. Short, a brother of plaintiff. W. H. had signed a note for three

the protection of section 2303, and should not be reversed unless the reviewing court believes that error was committed against the complaining party, and materially affecting the merits of the action.

2. It may be well just here to refer to a technical objection to our considering at all the defendant's answer, in so far as the latter denies the partnership. Plaintiff insists that, because defendant's denial is not under oath, the allegation of partnership should be taken as admitted, citing section 2186 of the Revised Statutes of 1889.

That section dispenses with proof of certain allegations of partnership in actions by, or against, alleged partners, unless the denial thereof is sworn to. But the terms of the statute do not reach the case of a suit by one individual against another, charging a partnership relation between them. Such a state of facts is ⁵²⁶ not within the letter of the statute, nor do we regard it as within its spirit or intent.

3. The leading contention of defendant is, that the settlement of partnership accounts (sought by plaintiff in this suit) is barred by force of the earlier judgment in the case of Taylor v. Short, the second of the two actions already described. That judgment has been quoted at length to give every reader a clear view of its exact meaning. The substance of defendant's argument regarding it is, that as the present plaintiff, then defendant, demanded (in his answer in that case) a declaration of the partnership and also a settlement of the partnership accounts, the judgment which followed that demand is a bar to a like claim put forward by the same party in the suit at bar.

If the issues mentioned were raised and decided in the former case between the same parties, they cannot rightly again be litigated. And if the prior judgment necessarily decided the issues in question, the latter are concluded, though no specific findings may have been announced as to those issues. It is evident that the same issues as to partnership and account submitted in this suit were raised by Mr. Short by his answer in the former action. He prayed affirmative relief in that answer; but the court made no finding for such relief or on that issue. The judgment was not reached after a trial of that case, but by means of a stipulation that the case should abide the fate of the other action between Mr. Taylor and Mr. W. H. Short.

A judgment pronounced by consent of parties or upon stipulation should be accorded the same force as other judgments: In re South etc. Co. (1894), 1 Ch. (1895) 37. Where, however, the extent of the adjudication does not appear by the record, the pro-

ceedings may be looked into by evidence for the purpose of ascertaining the matter actually involved in the ⁵²⁷ decision, so far as such inquiry may not conflict with the recitals or purport of the record. The stipulation on which the judgment now in question is based may certainly be examined to see whether the issue as to the state of the partnership accounts was in fact decided in the prior action. Neither the finding for defendant in that action nor the judgment "that plaintiff take nothing by this action and that defendant have and recover of plaintiff his costs," etc., disposed of the counter-demand of defendant for a statement of the partnership account. Proof that that issue was not in fact decided does not contradict the record of judgment in that cause. The stipulation makes it clear that that portion of the case remained undecided, and hence that the former judgment is no bar to the plaintiff's present suit. That result must follow whether we view the stipulation as strictly a part of the record, leading to the judgment, or as mere evidence to elucidate the scope of the judgment. The stipulation came into the proceedings of the case at bar without objection, and is entitled to due weight as explanatory of the actual decision in the former action.

The plaintiff, on the other hand, asserts that the judgment in the aforesaid action established conclusively the fact of the partnership between him and Mr. Taylor. That it did, to the extent comprehended by the issues on that subject in that case, which were actually determined by the final decision therein. But as the issue did not go further than the inquiry as to the partnership relation at the time the note then in suit was made (1886), it is obvious that the former judgment cannot properly be regarded as adjudicating the fact, or the terms, of a partnership in 1882, as alleged in the plaintiff's petition in the suit now at hand.

⁵²⁸ 4. Defendant complains that the report of the referees required him to take the mill property at an appraisement fixed by them, and to account for one-half of the value so ascertained. We do not regard this objection as accurately presenting the effect of the report on this point. Defendant had acquired the legal title to the property by purchase at the sale under the deed of trust in 1887. He asserted an exclusive right to it, and denied the plaintiff's interest therein as partner or otherwise. Under the pleadings (which presented only the issues of partnership, accounting and *res judicata*), it was entirely proper to charge defendant with the value of the property which he had taken exclusive possession of, and to which he held title, after the referees

found that plaintiff was equitably entitled to share equally therein because of the partnership. Had Mr. Taylor wished to rid himself of the obligation to account for that property to the firm, he should have taken some appropriate steps in the trial court to put the title at the disposal of the firm. There was no error in treating his omission to take any such steps as an election to retain the property; and, in that event, it was entirely proper to charge him in the settlement with the fair and reasonable value to his partner's share thereof—which was what the referees did.

5. It is not necessary at this time to go into the accounting. It is conceded that there was sufficient evidence before the referees to warrant their findings on that issue, except in the particulars already discussed, and, with those exceptions, no revision of the result of the accounting by the referees is asked here.

6. The fact that plaintiff, in 1882, gave to defendant notes, secured by a deed of trust on the property, does not preclude plaintiff from showing that ⁵²⁹ that transaction was but part of the agreed plan to put the ostensible title in him while defendant was to become an entirely dormant partner. The referees evidently accepted as true plaintiff's explanation of that feature of the partnership arrangement. We are not satisfied that in so ruling on the facts they were wrong. So we do not reverse that finding.

The judgment is affirmed.

Macfarlane, Robinson, and Brace, JJ., concur.

APPEAL—WHEN JUDGMENT WILL BE REVERSED—CONFLICTING EVIDENCE.—Where evidence is conflicting and involves credibility of witnesses, the appellate court will look to the whole evidence and sustain the verdict, unless there has been a plain deviation from right and justice, and the verdict is against the law or the evidence, or without evidence: *Muse v. Stern*, 82 Va. 33; 3 Am. St. Rep. 77, and note. See *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607, and note.

JUDGMENT BY CONSENT—CONCLUSIVENESS.—A judgment by agreement or compromise cannot be impeached unless for fraud, collusion, or like cause: *Dunman v. Hartwell*, 9 Tex. 495; 60 Am. Dec. 176; *State Bank v. Young*, 2 Ind. 171; 52 Am. Dec. 501.

JUDGMENTS—CONCLUSIVENESS OF.—The conclusiveness of a judgment, as between the parties to it is not confined to the matter litigated, but includes the finding of any facts which were in issue and necessarily decided: *State v. Branch*, 134 Mo. 592; 56 Am. St. Rep. 533, and note. See, also, *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84, and note. It includes every other matter which the parties might have litigated and had decided in the case: *Hentig v. Redden*, 46 Kan. 231; 26 Am. St. Rep. 91, and note.

JUDGMENT—RES JUDICATA—EVIDENCE.—If the matter in issue in a former suit does not appear upon the record offered, under the plea of the general issue, as evidence of such former adjudication, it may be shown by extrinsic evidence: *Little v. Barlow*, 87 Fla. 232;

53 Am. St. Rep. 249. See the monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 562-572, on the proof of *res judicata*.

JUDGMENT—CONCLUSIVENESS OF.—A judgment is conclusive as to facts and conditions as they existed at the time of its rendition: *Simmons v. Shelton*, 112 Ala. 284; 57 Am. St. Rep. 39, and note. See, also, *Gould v. Sternberg*, 128 Ill. 510; 15 Am. St. Rep. 138, and note.

APPEAL.—A QUESTION NOT RAISED AT THE TRIAL cannot be considered for the first time on appeal: *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note; *Riepe v. Elting*, 89 Iowa, 82; 48 Am. St. Rep. 356, and note.

STATE v. HOSTETTER.

[187 MISSOURI, 636.]

ELECTIONS—VACANCY IN OFFICE—BALLOTS.—If a vacancy in office, required to be filled at the next general election, occurs after the regular time for nominations has transpired, the proper parties in authority may make a nomination for such office, but it is the duty of the proper officer preparing the official ballot to cause the name of such office to be placed upon the ballot, whether any nomination is made therefor or not, and, if he fails to perform this duty, the electors are entitled to place on their ballots the name of the office entitled to be thereon, as well as the name of the party voted for such office.

OFFICERS—ELIGIBILITY OF WOMEN TO OFFICE.—A clerk of a county court is a ministerial officer, and as the constitution and statutes of Missouri only require that such office shall be filled by a citizen of the United States and of the state, without requiring that it shall be filled by a male citizen, a woman is not disqualified by reason of her sex alone from holding such office as she may possess the citizenship required.

CONSTITUTIONAL LAW—CONSTRUCTION.—A construction of a state constitution which renders meaningless any of its provisions should not be adopted.

OFFICERS—ELIGIBILITY OF WOMEN TO OFFICE—STATUTORY CONSTRUCTION.—The word "his," as used in a statute or state constitution as referring to the qualifications of officers, includes females as well as males, unless a contrary intent appears by the context or otherwise.

STATUTES—CONSTRUCTION.—In determining the meaning of an existing statute, the prior law and all changes therein should be considered.

E. C. Crow, attorney general, and Graves & Clark, and Francisco Brothers, for the relator.

Johnson & Lucas, for the respondent.

1 **642 BARCLAY, P. J.** This is an original action in this court to ascertain by what warrant defendant holds the office of clerk of the county court of St. Clair county. The proceeding was instituted by an information of the attorney general in his official capacity. The information contains a full recital of the facts. They have been admitted by the demurrer which defendant has

filed. Counsel in this court, with commendable fairness, have waived formalities that might have caused delay, and have submitted the cause for prompt decision upon briefs that have been of great help toward the speedy determination of the controversy.

In the view taken by this division of the court, the following are the decisive facts: Mr. Wheeler was elected clerk of the county court ⁶⁴³ at the general election of 1894 for a term ending in January, 1899. He died October 24, 1896. Two days later, the defendant, Mr. Hostetter, was commissioned by the governor to fill the vacancy. He qualified and entered on the duties of the office before the general election of November 3, 1896. He now holds the office by virtue of that appointment.

At the general election mentioned, Mrs. Maggie B. Wheeler and Mr. Hostetter received votes in St. Clair county for the office in question. On the twenty-sixth day of October, 1896, Mrs. Wheeler had been declared nominated for said office by the Republican party in said county. Her said nomination had been certified and acknowledged, and the certificate had been duly filed in the office of the clerk of the county court. Her name accordingly appeared (in advance of the election) upon the printed official ballot, as prepared for use at the election. The official ballot contained no other printed name as nominee for said office. The county tickets of the other political parties all showed blanks under the name of the office of clerk of the county court.

At the close of the election, it was found that Mrs. Wheeler had 1938 votes for the office, while Mr. Hostetter had received 92. He so certified as county clerk. In due time Mrs. Wheeler received her commission from the governor, and thereupon duly qualified, having complied with all the required forms of law, notwithstanding which the defendant still holds possession of the office. The object of this proceeding is to test his right to do so, from and after January 4, 1897, the date on which Mrs. Wheeler took the last formal step toward qualifying to enter upon the duties of the office.

There are two general grounds on which defendant seeks to justify the position he has assumed.

⁶⁴⁴ 1. Defendant first contends that there was, in legal effect, no vacancy to be filled at the election of 1896. The substance of the argument on that point is that the existing ballot law makes no provision for a nomination to fill such a vacancy, occurring within fifteen days of the general election; and hence that no election to fill the vacancy could properly be held in the circumstances of this case.

But we consider section 1964 a complete answer to that con-

tention, when read in connection with section 4766 as amended in 1893 (Laws 1893, p. 155):

"Sec. 1964. Vacancy, how filled.—When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act, or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

A special provision governing the filling of a vacancy in a particular office should be obeyed, even as against a later law on the same general topic, unless the court finds ground to conclude that the later general law was intended to repeal or limit the more particular provision of the prior law. But the terms of section 4766, as amended in 1893, show no intent to repeal any part of section 1964, touching the conduct of an election to fill such a vacancy.

The word "vacancy," as it is found in the last proviso of section 4766, no doubt means, as the learned counsel for defendant contend, a vacancy in some nomination. But where, by reason of death, as in this case, a vacancy in an office occurs shortly before a ⁶⁴⁵ general election at which some one to fill the office for the unexpired term should be chosen, and no one has been nominated to said office, there is a vacancy in the nominations within the meaning of the election law. The omission to make a nomination for an office to be filled at the ensuing election constitutes a vacancy on the ticket, and it is the plain duty of the officers who prepare the official ballots to cause the name of any such office to be printed on the ballot whether any nomination thereto has or has not been formally certified. Under section 4766 of the election law, such a "vacancy" certainly may be supplied, at any time prior to the election, by a nomination authenticated in the mode pointed out by the ballot law.

But even if we should concede that the vacancy caused by the death of Mr. Wheeler happened too late to permit of placing a formal printed nomination on the ballot, under the present ballot law, the people would nevertheless have the right to express their choice by writing on the ballot the name of any qualified person whom they desired to designate for any office which the law (section 1964) permitted to be then filled by election. The electors are not restricted to the names or offices printed on the official ballot: *People v. Shaw* (1892), 133 N. Y. 493; *People v. President* etc. (1895), 144 N. Y. 616; *Sanner v. Patton* (1895), 155 Ill. 558; *Cole v. Tucker* (1895), 164 Mass. 486.

We hence conclude that the election of a county clerk was properly held at the general election in St. Clair county in November last.

2. The question then remains whether Mrs. Wheeler is ineligible. Some objections of a technical nature are raised by the plaintiff against any consideration of that question ⁶⁴⁶ on this occasion. But we pass them by, because we find it unnecessary to decide them, since we have reached the conclusion that Mrs. Wheeler is eligible.

The qualifications required of incumbents of certain offices in Missouri are prescribed by the constitution. For instance, the governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general and superintendent of public schools must be "male" citizens, as must also be the members of the general assembly: Const. 1875, art. 4, secs. 4, 6, art. 5, secs. 5, 15, 19. Every circuit judge must be a "qualified voter," which requirement is in effect the same as the word "male" imposes (as used in reference to the state officers above named): Const., art. 6, sec. 26, art. 8, sec. 2.

The following general command of the organic law applies to all offices (including, of course, that in view in this case): "No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment": Const., art. 8, sec. 12.

There is no provision of the constitution, or of the statute law of Missouri, expressly requiring the clerk of the county court to be a male. But it is argued that the intent to so declare appears from the use of the word "his" in the section of the constitution just quoted, referring to all offices.

If this view is sound, then the special caution observed in the constitution by the sections requiring the state officers above mentioned to be males was wholly useless, as the general section last cited would imply that requirement. A construction of the constitution which renders meaningless any of its provisions should not be adopted.

It is part of the general law of the state (and was ⁶⁴⁷ before the time of the present constitution) that where persons are referred to by words importing the masculine gender, females as well as males shall be deemed included thereby, unless a contrary intent appears by the context or otherwise: Rev. Stats. 1855, sec. 10, p. 1024; Rev. Stats. 1889, secs. 6568, 6569. The mere use of the word "his" in the constitution, in referring to the qualification of officers, we do not regard as evidencing a purpose to limit

all office holding to the male sex, or as depriving the people of St. Clair county of the right to select a woman as clerk of their county court.

The section of the constitution last above quoted was a new enactment in the organic law of 1875. In view of the care with which the electoral franchise was limited to males by the terms of the second section of the same article of the constitution, the omission of similar language, in negatively defining certain qualifications of office holding, has a significance which tends toward the conclusion we have reached in this case.

The constitution, we think, remits to the legislature the subject of proper qualifications to be possessed by the holders of such an office as is here in question: Const., art. 6, sec. 39.

Turning to the statute law we find this provision in regard to the qualifications of clerks of the county court, viz:

"Sec. 1965. Qualifications of a clerk.—No person shall be appointed or elected clerk of any court, unless he be a citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk."

The above section and several other neighboring sections concerning clerks exhibit the words "he" and ⁶⁴⁸ "his" in treating of these offices. But we do not regard that fact as of moment when we recall the general rule for construction of laws, above alluded to: Rev. Stats. 1889, sec. 6568.

Women in Missouri have been licensed as attorneys at law by the supreme court. They have for years been recognized as eligible to office as notaries public. A woman now holds the responsible office of state librarian by appointment of the supreme court. Yet all of the laws under which such action has been taken display similar language to that in the law regarding clerks of courts from which the learned counsel for defendant seek to draw the inference that only males are eligible as such clerks: Rev. Stats. 1889, secs. 605, 607, 608, 7109, 7110, 8198, 8199, 8202.

The particular qualifications pointed out by section 1965 (except those of citizenship and age) are far less vital and important than that of sex. If the lawmakers had regarded sex as determining eligibility, it seems to us that they would have expressed themselves plainly to that effect, as they did in former years. They have so expressed themselves in other statutes; as, for in-

stance, in the school law, which requires directors in certain cities to have the qualifications of voters: Rev. Stats. 1889, sec. 8086. We have held that as only males can be voters, under the constitution of 1875, a woman is not eligible to be a school director under the section cited: *State v. McSpaden* (1897), 137 Mo. 628. The fact that in the law governing clerks of courts no similar requirement appears is a clear pointer to the conclusion that no such qualification was intended to be demanded.

Moreover, the change which the legislature has made in the language of the law on this very subject has much meaning in solving the question before this division.

⁶⁴⁰ In 1855 the present section 1965 had the form shown in the copy below. It so remained until 1879 when it was amended by dropping the words we have noted by italics, viz: "No person shall be appointed or elected clerk of any court, unless he be a *free white male* citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected, three months, before the election; and every clerk shall, after his election, reside in the county for which he is clerk": Rev. Stats. 1855, sec. 10, p. 336.

The dropping of the word "male," in describing the qualifications for such offices, has value as a guide to the legislative purpose in enacting the present law on this subject. Can there be any doubt as to the intended effect of such a change of the statute on the particular question before us?

It is always allowable in interpreting statutes to consider the prior law as compared with the present, in endeavoring to reach the true intent of the legislature which, when found, is the spirit of the law that the courts should enforce. That women may be citizens of the United States and of Missouri is a proposition that requires no discussion at this day: *Minor v. Happersett* (1874), 21 Wall. 162; *State v. County Court* (1887), 90 Mo. 593.

Mrs. Wheeler is a citizen of the United States and of this state. She is over the age of twenty-one years. She has resided in Missouri one year next preceding her election, and she possesses all the other qualifications named in section 1965. It is conceded that she is in all respects qualified, barring the supposed objection on account of her sex.

The office of clerk of a court is a ministerial office. It admits of the use of a deputy, and its duties are certainly ⁶⁵⁰ not of such a nature as to be incompatible of discharge by a woman.

In view of the condition of the positive law of Missouri above

described, we do not consider it necessary to enter into a discussion of the eligibility of women to office at the common law or in other states of the Union.

We regard the question at bar as one depending on the force and intent of the law of this state, organic and statutory. We hold that, under that law, there is no express or implied barrier to the election of a woman to such an office as that in question in this case, and that her fellow citizens may call her to discharge its duties if they see fit.

Mrs. Wheeler is qualified to hold the office, and Mr. Hostetter is not entitled to retain it on the facts disclosed. Hence the demurrer will be overruled, and judgment of ouster will be entered against defendant unless he plead further within ten days.

Macfarlane, Robinson, and Brace, JJ., concur.

ELECTIONS—POLITICAL RIGHTS OF WOMEN.—The elective franchise is not a natural right, but rests upon the authority of laws defining the qualifications of those who may exercise it. So, although a federal constitution makes women born or naturalized within the United States citizens and capable of becoming voters, yet that provision does not execute itself, but requires legislative action to authorize them to vote; and where the legislature have only enacted that male citizens may vote, women have no right to vote: *Spencer v. Board of Registration*, 1 McAr. 169; 29 Am. Rep. 582, and monographic note. Eligibility to office belongs to all persons not excluded by the constitution, and arbitrary exclusions from office cannot be established by the legislature: *Barker v. People*, 8 Cow. 686; 15 Am. Dec. 322. And under a statute providing that no person shall be precluded or debarred from any occupation, profession, or employment on account of sex, a woman may be master in chancery: *Schuchardt v. People*, 99 Ill. 501; 39 Am. Rep. 34, and extended note. See, also, *Wilson v. Newton*, 87 Mich. 498; 24 Am. St. Rep. 173; *Brown v. McCollum*, 76 Iowa, 479; 14 Am. St. Rep. 228.

STATUTES—CONSTRUCTION OF.—A statute should be so construed as to make it consistent in all its parts, and so that proper effect may be given to every section, clause, or part of it: *Ambler v. Whipple*, 130 Ill. 311; 32 Am. St. Rep. 202. See note to *Funk v. St. Paul City Ry. Co.*, 52 Am. St. Rep. 613. A statute is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes: *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48, and extended note.

CONSTITUTIONS—CONSTRUCTION OF.—Constitutions like statutes are properly to be expounded in the light of conditions existing at the time of their adoption: *Fox v. McDonald*, 101 Ala. 51; 46 Am. St. Rep. 98, and note; *State v. Camp Sing*, 18 Mont. 128; 58 Am. St. Rep. 551, and note.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

NEBRASKA NATIONAL BANK OF YORK v. FERGUSON.

[49 NEBRASKA, 109.]

CORPORATIONS—OBLIGATIONS OF.—Promissory notes signed "York Butter and Cheese Company, by F. A. Bidwell, president, J. D. White, secretary," are obligations of the corporation, and not of individual members thereof.

CORPORATIONS—ESTOPPEL TO DENY EXISTENCE OF—PARTNERSHIP OR INDIVIDUAL LIABILITY.—If a party deals with a company as a corporation, though it is imperfectly organized, sues upon notes made by it, and recovers judgment thereon, he is afterward precluded, in an action upon the same indebtedness, from assailing the existence of the corporation, and insisting upon a partnership or individual liability of its members.

Sedgwick & Power, for the appellant.

Gilbert Brothers and N. V. Harlan, for the appellees.

¹¹⁰ NORVAL, J. This action was instituted in the county court by the Nebraska National Bank of York against Nelson M. Ferguson and others to recover from defendants, as stockholders of the York Butter & Cheese Company, the amount of two promissory notes executed by said company. A general demurrer filed by the defendants to ¹¹¹ plaintiff's bill of particulars was sustained and the action dismissed by the county court. The bank thereupon prosecuted proceedings in error to the district court, where the judgment of the county court was affirmed. The plaintiff has brought the case to this court for review.

The bill of particulars avers, in substance, that on or about the twenty-fifth day of May, 1889, the defendants pretended to form a corporation under the name of York Butter & Cheese Company, and executed pretended articles of incorporation, elected officers, issued stocks in said corporation, and the defendants subscribed for said stock; that said pretended articles of incorpo-

ration provided, among other things, that "the business of this corporation shall be the manufacture of butter and cheese, and the purchase of milk and cream and such other property as may be necessary in connection with said business, and the corporation may purchase and hold, and convey and encumber, such real estate as may be necessary for the carrying on of such business, or as may be offered it in payment, or as security for claims owned by the corporation, and may purchase, raise, and deal in such livestock and other property as may be thought best by the board of directors in connection with the said business. The indebtedness of this corporation shall never exceed one-half of its paid-up capital." It is further alleged that the defendants did not file said articles of incorporation, or a copy thereof, with the secretary of state, and did not file with the secretary of state any certificate executed by the defendants, or any one of them, so that said defendants became individually liable for the indebtedness of such pretended corporation; that the paid-up capital did not at any time amount to more than five thousand five hundred dollars, yet the defendants from time to time held meetings and voted to incur indebtedness exceeding one-half of the paid-up capital; that on or about the twenty-second day of February, 1890, and on the tenth day of March, 1890, in the name of the said butter and cheese company, ¹¹² they borrowed money from the plaintiff and gave its promissory notes therefor, one for the sum of five hundred and thirteen dollars and fifty cents and the other for eight hundred and fifty dollars; that the indebtedness of the company at and prior to the borrowing of the money exceeded one-half of the paid-up capital of the company; that said notes were executed in the name of the "York Butter & Cheese Company, by F. A. Bidwell, president, J. D. White, secretary"; that plaintiff, on November 3, 1890, recovered judgment on said notes against said butter and cheese company for the sum of seven hundred and seventy-eight dollars and fifty-eight cents, no part of which has been paid, except two hundred and eighty-one dollars and eighteen cents. It is also alleged that the corporation at the time of the borrowing of the money was, and now is, insolvent; that no notice of the existing debts of the corporation has ever been published in a newspaper, as required by law, and that by reason thereof "said defendants are personally liable for the debts contracted by the said corporation."

It will be observed that the notes mentioned in the pleadings were signed "York Butter & Cheese Company, by F. A. Bidwell, president, J. D. White, secretary," and not with the individual names of the defendants, who were stockholders of the corpora-

tion. The instruments, as we gather from the averments of the bill of particulars, purport to be executed by, and to be the obligations of, the corporation. It does not appear that defendants are anywhere named as parties to them, either directly or impliedly. The corporation alone is designated as the party to be bound, and as it is not alleged or disclosed that the instruments are ambiguous, extrinsic evidence could not be resorted to to show that their effect and purport are different from that which the language employed plainly and unequivocally denotes; hence, the notes must be construed to be the obligations of the corporation. It is true it is averred that the defendants borrowed the money for which the notes were given, but it is manifest from the entire pleading the loans obtained were corporate transactions, and corporate debts were incurred. Credit was extended the corporation, and ¹¹³ plaintiff must have so regarded it, else it would not have accepted the notes of the corporation and brought suits and recovered judgments against it thereon. But it is said that the corporation was not liable for the money borrowed, because stockholders, as such, are powerless to transact corporate business, and that a corporation must contract through its directors, and not its stockholders. It is not averred that the board of directors of the York Butter & Cheese Company did not authorize the borrowing of the money. Moreover, the company recognized and ratified the transaction as valid and binding, by permitting judgments to go against it, as fully as if the notes upon which they were entered had been executed by its directors.

It is argued that the defendants were associated together for the purpose of engaging in the business of manufacturing; that the filing with the secretary of state of the articles of incorporation, or certificate of incorporation of a manufacturing company, is a condition precedent to the existence of any corporate franchise, and that since they were not so filed the defendants are liable as general partners. On the other hand, the defendants insist that the company was not exclusively a manufacturing corporation, and, therefore, under the general corporation law, it was not necessary that the articles should be filed with the secretary of state, but the filing thereof with the county clerk was sufficient. It is unnecessary to consider or decide the question argued. Assuming for the purpose of this case, without deciding the point, that such filing with the secretary of state was indispensable to the formation of a de jure corporation, nevertheless it is now too late for plaintiff to insist upon a partnership or individual liability of the defendants. It is precluded from doing so by bringing actions upon the notes and recovering judgments against the

York Butter & Cheese Company. 1 Cook on Stock and Stockholders, second edition, section 243, reads as follows: "In all cases, however, in which the members of an association might have ¹¹⁴ been held liable as partners, the right of the creditors to enforce that liability is barred by his bringing suit and obtaining judgments against the supposed corporation." In *Cresswell v. Oberly*, 17 Ill. App. 281, it is said: "But while the evidence fails to show a corporation fully organized at the time the indebtedness in question accrued, we think the plaintiffs are precluded from alleging that its organization was not then complete. They have elected to treat said indebtedness as an indebtedness of the corporation, and to sue the corporation and obtain judgment against it therefor. So far as they are concerned, all question on that subject should be deemed to have been foreclosed. The judgment having the effect of an admission by the plaintiffs, in the most solemn form, that the claim for which it was recovered was the debt of a corporate body, and therefore a debt in respect to which the members of the association were exempted from liability as partners, it should be held to operate against the plaintiffs as an estoppel." To the same effect is *Pochelu v. Kemper*, 14 La. Ann. 307; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477.

In addition to the recovery of judgments against the York Butter & Cheese Company upon the indebtedness made the foundation of this suit, plaintiff actually dealt with said company as a corporation, and therefore its corporate existence cannot be assailed by plaintiff in this action. As the liability of the defendants by reason of the company creating an indebtedness exceeding the statutory limit, and failing to give the annual notice of its indebtedness, is not argued in the brief of plaintiff, it will not be considered.

The judgment is affirmed.

CORPORATIONS.—A PROMISSORY NOTE in the ordinary form, reading "we promise to pay," and signed "Belle Plaine Canning Co., A. J. Hartman, President, H. Wessel, Secretary," in the absence of a clause showing the capacity in which the parties signed, binds all the persons signing, including the corporation, and extrinsic evidence is inadmissible to show the intention of the parties who signed the note: *McCandless v. Belle Plaine etc. Co.*, 78 Iowa, 161; 16 Am. St. Rep. 429. A note in the name of a corporation executed by the president thereof, for material used in the corporate business, binds the corporation: *Mott v. Hicks*, 1 Cow. 513; 13 Am. Dec. 550.

CORPORATIONS—ESTOPPEL TO DENY EXISTENCE OF.—One must contract or deal with a company as a corporation before he can be estopped from denying its corporate existence: *Duke v. Taylor*, 87 Fla. 64; 53 Am. St. Rep. 232; but, after so contracting or deal-

ing with it as an apparent corporation, he is ordinarily estopped to deny its corporate existence: Note to Jones v. Aspen Hardware Co., 52 Am. St. Rep. 227; monographic note to People v. Montecito Water Co., 33 Am. St. Rep. 185, on defective formation of corporations.

CORPORATIONS—PARTNERSHIP OR INDIVIDUAL LIABILITY.—The stockholders in a corporation, transacting business in a corporate name, though it is irregularly and imperfectly organized, cannot be held liable as partners: Duke v. Taylor, 37 Fla. 64; 53 Am. St. Rep. 232; but compare the note to this case, and the note to Williams v. Hewitt, 49 Am. St. Rep. 399; American Salt Co. v. Heldenhelmer, 80 Tex. 344; 26 Am. St. Rep. 743. Persons who have dealt with such a corporation as a corporation, and have given credit to it, and not to its individual members, cannot hold such members liable individually or jointly, as partners or otherwise, although the omission to comply with the requirements of the law was such that no valid organization was effected: Note to Williams v. Hewitt, 49 Am. St. Rep. 399; monographic note to Pittsburg Min. Co. v. Spooner, 17 Am. St. Rep. 162, on promoters of corporations, and their relations thereto.

MISSOURI PACIFIC RAILWAY COMPANY v. TIETKEN.

[49 NEBRASKA, 130.]

CARRIERS—LIVESTOCK—CONTRACT LIMITING LIABILITY.—A common carrier of livestock cannot, by contract with the shipper, relieve itself, either in whole or in part, from liability for its own negligence, which results in personal injury, to the shipper while traveling on a free pass and caring for his stock in transit.

CARRIERS—LIVESTOCK—LIABILITY FOR NEGLIGENCE. While a shipper of livestock, who travels on a free pass and cares for his stock in transit, assumes the risks incidental to taking care of his stock, this does not exonerate the carrier from liability to the shipper for personal injuries negligently caused by the employes of the carrier, as where they urgently direct him, while he is eating lunch at a station, to board a moving train, or be left, and, in trying to carry out the hazardous undertaking, the shipper is injured.

C. W. Seymour, David Kelso, James W. Orr, and B. P. Waggener, for the appellant.

John C. Watson and Charles A. Robbins, for the appellee.

¹³³ RYAN, C. In this action, which was brought in the district court of Otoe county, plaintiff recovered judgment on the verdict of a jury in the sum of two thousand five hundred dollars. He alleged in his petition that about October 9, 1890, he shipped over the defendant's road certain livestock from Scio to Chicago; that the train by which the shipment was made stopped at Weeping Water, and, as plaintiff was informed by the ¹³⁴ conductor, twenty minutes would be allowed plaintiff for obtaining a meal; that before said twenty minutes had expired said conductor suddenly and excitedly called out to plaintiff that he must immediately get on the train or be left; that said train was at the time moving

slowly, and that plaintiff, by reason of believing, relying upon, and attempting to obey the order of said conductor, attempted to board said train moving at a rate of speed unknown to plaintiff, and that, owing to the wrongful acts and negligence of the defendant, plaintiff was thrown in such a manner that the wheels of the cars of said train passed over plaintiff's right foot, necessitating its amputation, and over the large toe of the left foot, whereby its amputation was also rendered necessary. These averments were supplemented by averments of the damage caused which the defendant had refused to pay. By its answer the railroad company denied the above averments, and charged that the injuries of plaintiff were attributable to his own negligence. This charge of negligence was denied by plaintiff in his reply.

The questions presented by these error proceedings are, 1. Was the railroad company guilty of negligence? and 2. Was the defendant in error guilty of contributory negligence? It has been repeatedly held by this court that issues as to negligence and contributory negligence, where the evidence is so conflicting that from it different minds might draw different conclusions, must be determined by the jury: *Chicago etc. R. R. Co. v. Wilgus*, 40 Neb. 660; *Omaha etc. Ry. Co. v. Morgan*, 40 Neb. 604. As the jury found in favor of the defendant in error, we shall assume as established such pleaded facts as the evidence upon his behalf justified the jury in finding, without undertaking to set out the proofs submitted in rebuttal.

The defendant in error, when he made his shipment at Scio, received from the railroad company a contract which entitled him to free transportation in the caboose of the train whereby said shipment was made, that he ¹³⁵ might in transit give his stock such attention as circumstances might demand. Indorsed on this contract were the following provisions: "We, the undersigned persons in charge of the livestock mentioned in the within contract, in consideration of the free pass granted us by the Missouri Pacific Railway Company, and of the other covenants and agreements contained in said contract, including the rules and regulations at the head hereof and those printed on the back hereof, all which for the consideration aforesaid are hereby accepted by us and made a part of this, our contract, and all the terms and conditions of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employes of said company for the purposes in said contract stated, and that we do agree to assume, and do hereby assume, all risks incident to such employ-

ment, and that said company shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employes." Notwithstanding the above-quoted language the defendant in error was, for certain purposes, a passenger. His contractual right was to proceed upon the freight train upon which his cattle were being shipped. His duty was to care for his stock in transit, and his rights and privileges were limited by the necessity of traveling upon the aforesaid freight train and by the requirement that he must care for his stock: *Omaha etc. Ry. Co. v. Crow*, 47 Neb. 84. It was not inconsistent with any undertaking or obligation of the defendant in error for him to stop at a lunch stand to obtain a necessary meal, as was done in this case with the approval of the conductor. The theory of the defendant in error, in support of which there was such evidence that we cannot ignore the action of the jury thereon, was that while the defendant in error was eating, the conductor, in a hurried and excited manner, called out to him that he must immediately ¹²⁶ get on board the train or, if he did not, he would be left at Weeping Water and could not accompany his stock; that at once the defendant in error accordingly hurried to the train, which was moving, as the defendant in error thought, at a low rate of speed; that the part of the train which he reached was quite a distance ahead of the caboose; that by reason of the increase of the rate of speed of the train and the certainty that the caboose when it reached defendant in error would be moving quite rapidly, and because of the urgent directions of the conductor to get aboard at once, the defendant in error, that he might not lose his right of free transportation with his stock, was induced to climb the ladder on the side of the nearest freight-car, but that by the slipping of the feet of the defendant in error he was thrown to the ground in such a way that the injury in his petition described was unavoidable. It is vigorously insisted that it was negligence, per se, for the defendant in error to attempt to climb the side of a freight-car moving as was the one he attempted to board. The evidence adduced by the plaintiff in error very strongly tended to show that it was a very hazardous undertaking for one who did not understand his business, as it was expressed, to attempt the performance of the feat indicated, and this proposition is now asserted and reasserted in argument. We may, therefore, confidently assume that if the conductor urged the defendant in error to take this very course, the railroad company should not now be heard to assert that this was not negligence on the part of its conductor. It was testified by defendant in error that the train seemed to him to be moving at

such a rate of speed that he could with safety to himself catch hold of the ladder and climb up the moving box-car, and that he was impelled to do this by the peremptory directions given him by the conductor. It is evident from the verdict that these statements were accepted by the jury as truthful. While it has been held by this court that the acceptance of the right to ride upon the same train with ¹³⁷ his stock free of charge for the purpose of giving such stock necessary attention of necessity imposes upon the owner the incurring of such risks and inconveniences as result from such undertakings on his part, it has never been held that in other respects railroad companies as common carriers are exonerated from responsibilities with respect to this class of passengers. By an instruction as favorable to the railroad company as could reasonably be asked the jury was told that, ordinarily, it is negligence for a passenger to attempt to board a moving train, and that it is not sufficient to rebut such presumption of negligence to show that the trainmen acquiesced or directed him to make the attempt.

It is complained by the railroad company, in connection with the above propositions, that though the court instructed the jury that to excuse such an act and free the plaintiff from the charge of contributory negligence there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties, and that the mere fact that unless he so boarded the train it would proceed without him was not sufficient to justify making the attempt, nevertheless the jury found against the railroad company, whereby it is evident that this instruction was disregarded. It has already been noted that the defendant in error was ignorant of the danger attendant upon an attempt by an unskilled person to board a freight-car moving at the rate at which the one he attempted to board was moving, and that this danger was one well known to railroad men. Moreover, the evidence, accepted by the jury as true, established the fact that, notwithstanding these conditions, the conductor directed the defendant in error to make the hazardous experiment, which he did make with very disastrous results to himself. There was evidence on behalf of plaintiff in error that the conductor did not direct the defendant in error to attempt to climb upon the freight-car, but that it was a brakeman who informed the defendant in error that ¹³⁸ the train was moving and that he must not longer remain at the lunch stand. It was evidently with reference to the theory of plaintiff in error that whatever directions the defendant in error received were from a brakeman and not from the conductor, that there was embodied in the

above instruction the proposition that to rebut the presumption of contributory negligence it was not sufficient to show that the trainmen acquiesced or directed defendant in error to make the attempt to board the moving freight-car. As to the proposition that as a justification of this attempt there must be a coercion of circumstances which does not leave the passenger in the free and untrammelled possession of his faculties, it is probable that the court meant merely what would have been expressed if instead of "faculties" the word "judgment," or some equivalent term, had been employed. While this word was not happily chosen, we cannot believe that it was misleading to the prejudice of plaintiff in error. The coercion which tended naturally to induce the attempt to climb upon the moving freight car was not embraced in the instruction which it is insisted the jury ignored, for, aside from the enumerated acquiescence and direction of trainmen and the prospect that the train would leave the defendant in error if he failed to board the moving car, there was the authoritative command of the conductor to do what is now condemned. It is not impossible that to this authority ordinarily recognized there was superadded considerable weight by the provisions of the contract of shipment, among which was one that during the time defendant in error was in charge of his stock he should be deemed an employé of the railroad company. It is not perceived why it must be assumed that the jury ignored the instruction under consideration by returning the verdict which it did in this case. Under the circumstances, by other instructions it was properly submitted to the jury to determine as a question of fact whether or not the defendant in error had been guilty of contributory negligence in yielding ¹³⁰ obedience as he did to the command of the conductor. We have not overlooked the fact that by the conditions of the contract of shipment it was provided that the shipper assumed all risk incident to his being an employé, and that the company could be held liable only for such injuries or damages as it would as to a regular employé. In *Chicago etc. Ry. Co. v. Witty*, 32 Neb. 275, 29 Am. St. Rep. 436, it was held that a common carrier of livestock cannot by contract with a shipper relieve itself, either in whole or in part, from liability or loss resulting from its negligence. The liability in that case was with reference to the freight transported; but we can see no reason why the principle is not applicable to an incidental right—that of being transported safely while caring for stock in transit. In so far as the shipper is required to assume risks incidental to taking care of his stock, he of necessity waives his right to be treated as an ordinary passenger, but this waiver

ought never to be extended to negligence on the part of the company to perform its duties proper under the circumstances as a common carrier.

The judgment of the court is affirmed.

CARRIERS—LIVESTOCK—CONTRACT LIMITING LIABILITY. A common carrier cannot, by contract, exonerate itself from the consequences of its own negligence: Note to Davis v. Chicago etc. Ry. Co., 57 Am. St. Rep. 943; Hudson v. Northern Pac. Ry. Co., 92 Iowa, 231; 54 Am. St. Rep. 550; and this rule applies to railroad companies engaged in carrying livestock: Note to Norfolk etc. R. R. Co. v. Harman, 50 Am. St. Rep. 860.

CARRIERS—LIVESTOCK—LIABILITY FOR NEGLIGENCE.—A drover riding on the defendant's railroad, on a free pass, to take care of his stock, was killed by the defendant's negligence. The pass provided that he took his own risk of personal injury from any cause whatever; and it was held that this did not prevent a recovery: Note to Meuer v. Chicago etc. Ry. Co., 49 Am. St. Rep. 908. This case and note show, however, that the contrary doctrine is sometimes maintained.

SCHOTT v. DOSH.

[49 NEBRASKA, 187.]

DEEDS OF QUITCLAIM—PRIORITY.—A quitclaim deed properly recorded, in favor of one who purchases in good faith and without notice of a prior unrecorded conveyance, takes precedence of such conveyance.

THE MAXIM THAT IGNORANCE OF THE LAW excuses no one, is not so broad in its application that a mistake of law cannot be shown in evidence for the purpose of ascertaining the state of one's mind or one's motive.

John H. Ames and E. F. Pettis, for the appellant.

Montgomery & Hall, for the appellees.

BY IRVINE, C. This action was by Schott against L. P. Dosh, J. R. Dosh, and James K. O. Sherwood, to quiet title to land described as the west one-half of section 31, township 3 north, of range 8 west, in Nuckolls county. The only defendant to answer, and the only one referred to in the decree, is Sherwood, and it is not necessary to consider any rights except those existing as between him and the plaintiff. It is conceded that a patent was issued conveying the land in controversy to George L. Bittenger. The plaintiff claims under a deed from Bittenger and wife to him, dated June 23, 1870. This deed was not, however, recorded until June 23, 1890, and was not even then entitled to record for want of a certificate of acknowledgment. Sherwood deraigns his title as follows: A quitclaim deed from Bittenger and wife to L. P. Dosh, dated August 22, 1882, recorded Sep-

tember 19, 1882. Warranty deed from L. P. Dosh and wife to J. R. Dosh, dated October ¹⁸⁸ 27, 1882, recorded November 20, 1882. Warranty deed from J. R. Dosh and wife to Sherwood, dated January 13, 1883, recorded April 24, 1885. Subsidiary to the latter chain of conveyances are certain tax deeds, followed by conveyances to L. P. Dosh and Sherwood by the grantees named therein. While these tax deeds are material on the question of evidence hereinafter discussed, it is conceded that they are on their face void and may be excluded in tracing the title. On appropriate pleadings, the answer of Sherwood praying for cross-relief, the court found generally in favor of Sherwood and entered a decree quieting title in him. From this the plaintiff appeals.

The questions presented by the record are as follows: 1. Does a quitclaim deed, properly recorded, in favor of one who purchases in good faith and without notice of a prior unrecorded conveyance, take precedence of such conveyance? 2. If so, does the evidence in this case sustain the finding of the trial court that Sherwood was such a bona fide purchaser without notice? 3. If the first question should be answered in the negative, are subsequent grantees under deeds of warranty subject to outstanding equities because of a remote quitclaim deed in their chain of title? On the authority of *Snowden v. Tyler*, 21 Neb. 199, the case might probably be solved in favor of the defendant on the last question, regardless of the others; but for several reasons we shall consider the first two stated. One reason is, that while the first question has several times been brought to the attention of the court, the cases have always been complicated by facts which have rendered an authoritative decision impossible, and the dicta which have been expressed have not served to remove the generally prevailing doubt on this question of very apparent practical importance. The second reason is, that in many, and in fact all the earlier, cases holding that the grantee under a quitclaim deed is not in such case entitled to protection, the reason given is that such a deed does not purport to convey the fee or ¹⁸⁹ even limit the estate, but merely to release any claim which the grantor may have. If this reason be well founded, then it seems illogical to hold that a remote grantee obtains any greater title than the immediate grantee, both claiming through a deed which purports to convey the same interest. We shall direct our attention, therefore, to the first question, and in the first place to a consideration of the former expressions of this court.

In *Lincoln Building etc. Assn. v. Hass*, 10 Neb. 581, it was said: "The effect of this quitclaim deed was only to pass the naked legal title, and changed no equities of the parties." A con-

consideration of the case discloses that no interest whatever appeared of record or otherwise in the grantor, a deed whereby it was intended to convey an interest by mistake omitting the land in controversy from the description. The question was between the grantee under the quitclaim deed and a mortgage from the same grantor. No protection was claimed under the recording acts and the decision was wholly foreign thereto. We refer to the case only because it is cited in argument, and because it has been several times cited as supporting the doctrine that the grantee under a quitclaim deed is not protected.

In *Hoyt v. Schuyler*, 19 Neb. 652, it was held that there was a record of the prior deed sufficient to impart notice. It was also stated that it neither was alleged in the petition nor claimed in the brief that the appellant was a bona fide purchaser. Therefore, the following statement of the court was merely obiter, that "the form of the conveyance repels the inference of a bona fide purchaser"; as was also the further statement that "the plaintiff 'merely took the interest of Carter, and as he had previously conveyed all his right, title, and interest in the lot, the grantee under the second deed took nothing.'" Nevertheless, the court, evidently for the purpose of preventing these obiter dicta from being taken as announcing an absolute rule, added that "a party who claims title under a quitclaim deed from one who had formerly conveyed his ¹⁸⁰ title to another, and the effect of which will be to deprive the first grantee of his title, must make a clear case of bona fides on his part before his title will be sustained."

In *Snowden v. Tyler*, 21 Neb. 199, remote grantees under a deed of quitclaim were protected. It was claimed that the quitclaim deed passed no title, and that therefore none passed under deeds from the grantee therein. The court said: "The rule, no doubt, is that a person who purchases of another real estate, and receives a quitclaim deed only therefor, is bound to inquire and ascertain at his peril what outstanding equities exist, if any, against the title. . . . We are not prepared to hold, however, that a quitclaim deed, where the grantor has already conveyed, will not in any case convey title. . . . It is the policy of the law that titles to real estate shall become matters of certainty as far as possible, and that one who acts in good faith in purchasing, and pays the value of the property, shall be protected in his purchase." The court, therefore, put the protection of remote grantees not upon the illogical ground that while a quitclaim deed purports to and does only pass the grantor's estate, the magic of a covenant of warranty in a subsequent deed will enlarge that estate beyond what the first deed purports to convey, but the

conclusion was placed upon the logical ground that one who finds a complete chain of conveyances to his grantor, without apparent defects and without notice of outstanding equities, and who pays value, will, under the recording acts, be protected. This logic applies as well to immediate grantees as to a remote grantee.

In *Lavender v. Holmes*, 23 Neb. 345, the subject was again considered, many of the cases reviewed, and the conclusion reached that "while we concede it to be the general rule, as stated by the authors above cited, that a purchaser who acquires title by a quitclaim deed is not a bona fide purchaser without notice of existing equities, yet we think it is sufficiently shown that there are exceptions to this rule, and that this case falls within the exception." ¹⁹¹ This was not, however, a case involving a construction of the recording acts.

In *Pleasants v. Blodgett*, 32 Neb. 427, the language already quoted from *Hoyt v. Schuyler*, 19 Neb. 652, to the effect that a conveyance by quitclaim "repels the inference of a bona fide purchaser," was repeated; but the holding of the court was that the grantee had actual notice of the adverse claim. This was also the doctrine of the court on the rehearing of the same case: *Pleasants v. Blodgett*, 39 Neb. 741; 42 Am. St. Rep. 624.

A case much relied on by the appellant is *Bowman v. Griffith*, 35 Neb. 361; but a careful examination of the case convinces us that it is entirely without application. It is true that one of two reasons given for not holding that an estoppel in pais existed against a grantor was that the grantee had accepted a quitclaim deed; but no question was involved of the construction of the recording act, and the reasons for enforcing an estoppel in pais, which would produce an effect equivalent to a covenant for title, are quite different from those which control the construction of the recording act. The case was very complicated in its facts, and we cannot hope to state it more briefly than it is stated in the lucid language of the author of the opinion. Space does not permit that we should repeat this statement to show the inapplicability of the case. Suffice it to say that the question there presented was whether one, who had accepted a deed containing recitals showing that it was made to correct a former deed purporting to convey land which had in fact been conveyed to another person, could set up title as against that other person, and contrary to the terms of the deed which he had accepted.

The foregoing review we think shows that, while the court has expressed itself to the effect that a quitclaim deed passes no more than the grantor's present interest, this expression has been used to state a general truth, and not as a construction of the record-

ing act, and that, so far as concerns the rights of a grantee under a quitclaim deed by virtue of the recording act, the court, while intimating ¹⁹² that the tender of a quitclaim deed puts a purchaser on inquiry, has nevertheless always intimated that on proof of bona fides he is entitled to protection; and in one case, at least, has afforded him protection.

Cases elsewhere are conflicting. In some states it is held that a quitclaim deed conclusively charges the grantee with notice of outstanding equities, including prior unrecorded conveyances: *Smith v. Branch Bank at Mobile*, 21 Ala. 125; *Leland v. Isenbeck*, 1 Idaho, 469; *McAdow v. Black*, 6 Mont. 601; *Snow v. Lake*, 20 Fla. 656; 51 Am. Rep. 625. To these may be added some others, but they require comment. *Woodfolk v. Blount*, 3 Hayw. 147, 9 Am. Dec. 736, frequently cited as sustaining that view, really leaves the question undecided. In *Bragg v. Paulk*, 42 Me. 502, the conveyance was a mortgage to secure a past debt, and the court held that this did not constitute a purchase for a valuable consideration. *Marshall v. Roberts*, 18 Minn. 405, 10 Am. Rep. 201, was based on the construction of a peculiar statute, and Oregon, having adopted the same statute (*Baker v. Woodward*, 12 Or. 3), follows the Minnesota case in its construction. The effect of the Minnesota decision was, however, to induce the legislature to amend the statute; and since the amendment the Minnesota court has held that a quitclaim deed stands on the same footing as any other conveyance: *Strong v. Lynn*, 38 Minn. 315. In South Dakota, the author of the principal opinion announces the rule that a quitclaim deed charges a purchaser with notice; but Judge Corson dissented on this point, and Judge Kellam only concurred on the ground that there was actual notice. The court was composed of but three judges: *Parker v. Randolph*, 5 S. Dak. 549. In Michigan, the court was once evenly divided on the question, Chief Justice Cooley and Judge Sherwood holding that the quitclaim deed afforded protection, Judges Campbell and Champlin holding that it did not: *Deveaux v. Fosbender*, 57 Mich. 579. Recently, however, an unanimous court has adopted the view of Judges Campbell and Champlin: *Peters v. Cartier*, 80 ¹⁹³ Mich. 124; 20 Am. St. Rep. 508. Texas after much vacillation and without any careful discussion of the authorities elsewhere, has adopted a similar view, but restricted it closely to a technical release as distinguished from a deed of bargain and sale without covenants: *Richardson v. Levi*, 67 Tex. 359. Nearly all the recent cases adopting the view which we have been discussing cite the case of *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243. This case cited most of the authorities then exist-

ing, and held that one who claims under a quitclaim deed is not a bona fide purchaser with respect to outstanding equities shown by the records, or which are discoverable by the exercise of reasonable diligence on making proper examination and inquiries. It admitted that a purchaser under a quitclaim deed may be a bona fide purchaser with reference to a prior unrecorded deed of which he has no notice.

On the other hand, the following cases hold, and we think with better reason, that there is no distinction as to the form of conveyance; that in this country and in modern times a deed of quitclaim is not merely a release, but operates to pass the grantor's title, even to one who could not at common law accept a release; that the recording acts draw no distinction; that under them the question is not under what form of conveyance one claims, but whether one is a bona fide purchaser, and that, therefore, the holder of a quitclaim deed is entitled to the same protection as one under a deed of bargain and sale or containing covenants of warranty: *Moelle v. Sherwood*, 148 U. S. 21; *Wilhelm v. Wilken*, 149 N. Y. 447; 52 Am. St. Rep. 743; *Graff v. Middleton*, 43 Cal. 341; *Bradbury v. Davis*, 5 Colo. 265; *Brown v. Banner Coal etc. Co.*, 97 Ill. 214; 37 Am. Rep. 105; *Chapman v. Sims*, 53 Miss. 154; *Willingham v. Hardin*, 75 Mo. 429; *Cutler v. James*, 64 Wis. 173; 54 Am. Rep. 603. In several of the states, the cases cited overrule earlier cases holding the contrary view. The tendency of the decisions is uniformly in favor of the quitclaim deed, except in Iowa, where it was formerly held that the holder thereof was protected, and it is now held that he is not: *Pettingill* ¹⁸⁴ v. *Devin*, 35 Iowa, 344; *Steele v. Sioux Valley Bank*, 79 Iowa, 339; 18 Am. St. Rep. 370.

The question has been so much discussed that any extended inquiry into the reasons would not be novel. Those given in support of the rule denying quitclaim deed protection are two in number. The first we have already alluded to: Such a deed does not purport to convey any definite estate, but merely the grantor's interest. This reason refers back to the obsolete doctrine of common-law releases. In modern law, it is not supposed in any case that a grantor is conveying more than he owns. Our statute provides that every conveyance shall pass all the grantor's interest, unless a contrary intent can be reasonably inferred from the terms used: Comp. Stats., c. 73, sec. 50. There is nothing, therefore, in the fact that a grantor only purports to convey his interest which should charge a purchaser with notice of a prior unrecorded conveyance. The other reason given is, that the fact that the grantor declines to warrant the title is enough

to arouse suspicion. This may or may not be true according to circumstances. So far as the reason has any force generally, it seems to be fairly met by the suggestion of Mr. Rawle in his work on Covenants for Title, that the fact that a personal covenant is required is itself a circumstance casting suspicion upon the title conveyed. A conveyance by quitclaim is by no means uncommon in modern times when there are no outstanding equities; and it is certainly a conceivable case that a man may be willing to accept such a conveyance, for the very reason that he is confident that he obtains a perfect title which would render covenants of no service. Aside from the foregoing reasons for denying a quitclaim deed protection, the cases holding that doctrine nearly all depend for their support upon certain dicta in the supreme court of the United States, notably the case of *May v. Le Claire*, 11 Wall. 217. Judge Brewer, in the district court for this district, in the absence of a direct adjudication by this court, felt constrained to follow these ¹⁹⁵ dicta in *Hastings v. Nissen*, 31 Fed. Rep. 597; but in *Sherwood v. Moelle*, 36 Fed. Rep. 478, a case precisely like that before us, and involving some of the same conveyances, he resolved it in favor of Sherwood, intimating a doubt as to the general application of the old rule, but basing his decision on the ground that *Snowden v. Tyler*, 21 Neb. 199, protected a remote grantee. This case went to the supreme court of the United States (*Moelle v. Sherwood*, 148 U. S. 21), and was there affirmed, Judge Brewer concurring, on the broad ground that the receipt of a quitclaim deed does not prevent a party from becoming a bona fide holder, and that the previous dicta of the court were not sound in principle.

Section 45, chapter 73, of the Compiled Statutes, defines a purchaser as embracing "every person to whom any real estate or interest therein shall be conveyed for a valuable consideration." The term "deed" is defined in section 46 as embracing every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or for a less time. The recording act (Comp. Stats., c. 73, sec. 16) provides that deeds shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and such deeds, mortgages, or other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded. In view of the definitions given of "deed"

and "purchaser," we cannot hold that section 16 does not apply to the grantee under a quitclaim deed without a judicial amendment of the plain language of the statute.

This brings us to the question of fact. Does the evidence sustain the finding that Dosh was an innocent purchaser from the patentee? We have no hesitation in ¹⁹⁶ saying it does. The evidence discloses that before Bittenger obtained a patent for the land he went to Pennsylvania, where he made a sale of it to Schott. The conveyance to Schott was not recorded, and the land remained wild and unoccupied until shortly before this action was commenced. Taxes accumulated, and the land was sold therefor to one Furst. A tax deed was issued to him. Several years thereafter, Furst conveyed to Dosh, Dosh paying him thirteen hundred and fifty dollars for the land. At this time it was stipulated that the land was worth fourteen hundred and forty dollars. Dosh testifies that before he purchased he went to Nuckolls county and looked at the land, which was at that time open, unoccupied prairie. He also examined the record as to the title and found the patent title in Bittenger, whom he found afterward and from whom he obtained a quitclaim deed for one hundred dollars. He had theretofore made his contract with Furst. Dosh lived in Iowa, where tax titles were regarded as good, and supposed the title he had acquired from Furst was good. He paid Bittenger for his title because he thought he would perfect thereby his title to the land and make it more readily salable. It is argued that his testimony as to finding the title in Bittenger is false, because the patent of Bittenger was not recorded in Nuckolls county at that time. It will be observed, however, that he does not testify that he ascertained the title solely from the county records of Nuckolls county. His testimony is that he went to Nuckolls county to look at the land and found it unoccupied, and that he examined "the records," without saying what records, and found the patent title in Bittenger. He was not cross-examined upon this, and we cannot presume that he committed perjury merely because the Nuckolls county records did not then disclose title in Bittenger. It appeared from them at that time that the title was in the United States, and an examination of the records of the land office would have disclosed title in Bittenger, as Dosh testified he found it. The maximum that ignorance of the law excuses no one is not so broad in its application that a mistake ¹⁹⁷ of law cannot be shown in evidence for the purpose of ascertaining the state of one's mind or one's motive. At the time in question the effect of a tax deed in this

state was doubtful. Dosh, living in Iowa, might, as he testifies he did, place more reliance on the tax title than the law of this state warranted. He paid almost the full value of the land to the tax purchaser. There would be nothing in the fact that the patentee, who had apparently neglected the land for twelve years, was willing to convey to him for a small sum which would be calculated to apprise him of a prior unrecorded conveyance. Especially is this true in view of the fact that by proper litigation between him and the patentee he would be entitled to subrogation at least to the whole tax claim; and the existence of the outstanding tax title which he bought would sufficiently account, if investigation were necessary, for the tender to him of a quitclaim deed instead of one with covenants of warranty. It would tax the patience of anyone at all familiar with the history of such transactions in this state to argue that there was anything unusual, suspicious, or calculated to inform a person of outstanding equities, in the fact that a deed of quitclaim was tendered under such circumstances. The evidence is in these respects uncontradicted. The court found that Dosh was an innocent purchaser. On apparently the same state of evidence on some of the same conveyances the supreme court of the United States unanimously held the same. We cannot disturb the finding, and we think it is right.

It is suggested at the close of the brief of the appellant that the trial in the district court was formal only and that the judgment "was in fact, though not of record, entered practically by consent, so as to make a record reviewable by this court." We must, however, give the finding of the trial court the effect which the record entitles it to. If it is true that the finding was made practically by consent, as the appellant states, the record should have so disclosed, and that would have precluded ¹⁹⁸ the plaintiff from any right to review. Not so appearing of record, we must presume the judgment was the deliberate judgment of the trial court, on the issues joined.

Affirmed.

DEEDS OF QUITCLAIM—PRIORITY.—A purchaser by quitclaim deed, for value, and without notice, is held, in many cases, to acquire title as against a prior unrecorded deed or other instrument conveying or affecting real estate: *Note to Wilhelm v. Wilken*, 52 Am. St. Rep. 747; *Merrill v. Hutchinson*, 45 Kan. 59; 23 Am. St. Rep. 713; *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 306; *Fox v. Hall*, 74 Mo. 315; 41 Am. Rep. 316. A recorded quitclaim deed takes precedence of a prior unrecorded warranty deed: *Cutler v. James*, 64 Wis. 173; 54 Am. Rep. 603; *Brown v. Banner Coal etc. Co.*, 97 Ill. 214; 37 Am. Rep. 105. It transfers title as effectually as a deed of bargain and sale: *McConnel v. Reed*, 4 Scam. 117; 38 Am. Dec. 124; *Smith v. Pendell*, 19 Conn. 107; 48 Am. Dec. 146; and vests title against a prior

unrecorded deed of bargain and sale: Note to Johnson v. Tool, 25 Am. Dec. 164. On the other hand, one claiming under a quitclaim deed is held not to be a bona fide purchaser without notice: Wood v. Holly Mfg. Co., 100 Ala. 326; 46 Am. St. Rep. 56; Peters v. Cartier, 80 Mich. 124; 20 Am. St. Rep. 508; Garrett v. Christopher, 74 Tex. 453; 15 Am. St. Rep. 850; Thorn v. Newsom, 64 Tex. 161; 53 Am. Rep. 747; Marshall v. Roberts, 18 Minn. 405; 10 Am. Rep. 201; Rodgers v. Burchard, 34 Tex. 441; 7 Am. Rep. 283. A grantee under a recorded quitclaim deed is subordinate to a prior unrecorded mortgage by his grantor: Snow v. Lake, 20 Fla. 656; 51 Am. Rep. 625; and an unrecorded bond for a deed takes precedence of a subsequent quitclaim deed, though based upon a valuable consideration, and taken without actual notice of the bond: Steele v. Sioux Valley Bank, 79 Iowa, 339; 18 Am. St. Rep. 370. The effect of a quitclaim deed is discussed at some length in the note to Thorn v. Newsom, 53 Am. Rep. 494-520.

IGNORANCE OF ONE'S RIGHTS as a ground of relief is the subject of a monographic note to Alabama etc. Ry. Co. v. Jones, 53 Am. Rep. 749-752.

NYE & SCHNEIDER COMPANY v. FAHRENHOLZ.

[49 NEBRASKA, 276.]

JUDICIAL SALES—APPRAISEMENT.—Appraisers, at judicial sales, act judicially, and the appraisement, unless set aside, becomes a portion of the terms of sale, and is conclusive.

JUDICIAL SALES—PURCHASER'S NOTICE.—The purchaser, at a judicial sale, is charged with notice of the condition of the title and of the appraisement.

JUDICIAL SALES—ERROR IN APPRAISEMENT—RIGHTS OF PURCHASER AND MECHANIC'S LIENHOLDER.—If appraisers, in mortgage foreclosure proceedings, through a mistake, deduct from the value of the property the amount due on a mechanic's lien as a prior encumbrance, when such lien is, in fact, junior to the mortgage, and the holder of such lien is not made a party to the foreclosure suit, the purchaser, if he lets the appraisement stand without question, is bound by it, and buys subject to the mechanic's lien. He cannot, therefore, after confirmation of the foreclosure sale and in a suit to foreclose the mechanic's lien, be heard to assert that his purchase was on terms different from those shown by the record, especially where his bid was only two-thirds of the appraised value after deducting the lien. The holder of the mechanic's lien is, consequently, not compelled to redeem, but is entitled to a decree of foreclosure, and the mortgagor, being personally liable for both the mortgage debt and that created by the mechanic's lien, has such an interest that he may insist upon the subjection of the property to the payment of the mechanic's lien.

Munger & Courtright, for the appellants.

A. R. Oleson, for the appellee.

276 IRVINE, C. This case has been submitted under rule 2, upon an agreed printed abstract. The facts are that one Colton, who had been the owner of the southeast quarter of section 15, township 23, range 3, in Stanton county, in 1889 contracted to sell the same to one Lindner. March 3, **277** 1892, Lindner as-

signed the contract of sale to Fahrenholz, executing a mortgage on the premises to Lindner to secure the purchase money of the assignment. Between March 19 and October 15, 1892, the Nye & Schneider Company sold building-material to Fahrenholz for the construction of a dwelling-house on the land, and subsequently perfected a mechanic's lien thereon. The land was then subject to three encumbrances: 1. The unpaid purchase money due on the contract between Colton and Lindner; 2. The mortgage from Fahrenholz to Lindner; 3. The plaintiff's mechanic's lien. Lindner had sold his note and mortgage to one Schock, who, in 1893, began a suit to foreclose the mortgage; but he failed to make the Nye & Schneider Company a party to the action. He obtained a decree of foreclosure, and there was a sale made thereunder to Oleson. The sheriff having made application to the county clerk for a certificate of encumbrances, the clerk certified as encumbrances against the land the contract, mortgage, and mechanic's lien referred to. The sheriff and appraisers in making the appraisement deducted from the gross value of the land not only the amount due on the Colton contract, but also the amount due on the mechanic's lien as a prior encumbrance, although the lien was in fact junior to the mortgage which was being foreclosed. Oleson purchased at a sum only a few cents greater than two-thirds the appraised value with the mechanic's lien deducted as a prior encumbrance. The Nye & Schneider Company afterward began this action, not to redeem from the Lindner mortgage, but to foreclose its lien, making Fahrenholz, Colton, and Oleson defendants. The defendant Fahrenholz answered setting up practically the same facts as the plaintiff, and joining in the plaintiff's prayer that the land be subjected to the payment of the mechanic's lien. The district court sustained a demurrer to this answer, and, on the trial of the issues between the other parties, found that the plaintiff's lien was junior to the mortgage which formed the basis of the decree under ²⁷⁸ which Oleson bought, and accordingly refused the plaintiff a decree of foreclosure, but offered to permit a redemption. The plaintiff declined to redeem and the court entered a judgment of dismissal.

As to the plaintiff, the question presented is the correctness of the court's holding that it was not entitled to foreclosure. We think, upon the record made, this holding was erroneous. The appraisement in the foreclosure case was clearly erroneous in treating the lien at that time as a senior encumbrance, and on motion in that case undoubtedly the appraisement might have been set aside and corrected. To be sure, the purchaser was not

before the sale in a position to attack the appraisement; but it is highly probable that on becoming the purchaser he was in such a position that he might have made an application to the court, which would have given him relief. That question is not, however, before us, because the appraisement stood without question. Oleson became the purchaser, the sale was confirmed, and the property conveyed to him without any objection to the appraisement, so far as the record discloses. Appraisers at such sales under our law act judicially: *Sessions v. Irwin*, 8 Neb. 5; *Vought v. Foxworthy*, 38 Neb. 790; and the purchaser at a judicial sale is charged with notice of the condition of the title and of the appraisement: *Norton v. Nebraska Loan etc. Co.*, 35 Neb. 466; 37 Am. St. Rep. 441; 40 Neb. 394. In the case cited it was held that the purchaser was not justified in relying on statements made to him by the sheriff and clerk, because he was bound to take notice of the record. We think it follows from these principles that the appraisement, unless set aside, becomes conclusive, and a portion of the terms of the sale; that, therefore, Oleson expressly bought subject to the mechanic's lien, and cannot be heard now to assert that his purchase was on terms different from those shown by the record. He contends that the necessary facts do not exist to raise an estoppel in pais; but this is not a case of estoppel in pais. If it is an estoppel at all, it is one of record. Indeed, we regard ²⁷⁰ the question as having been settled by the case of *Koch v. Losch*, 31 Neb. 625. It was there held that where a mortgage had been deducted in making an appraisement, the purchasers at the sale were thereafter estopped from denying the validity of the mortgage. It is argued that that case is distinguishable from the present case, because here the purchaser is not disputing the validity of the lien, but merely its priority. We can, however, see no distinction in principle. The principle of the *Koch* case is, that the purchaser is bound by the terms of the sale, and this principle applies as well against disputing the priority of liens, whether established by the decree or the appraisement, as the validity of the liens.

We think, also, that the demurrer to the answer of *Fahrenholz* should have been overruled. The property was originally subject to both liens. Because the mechanic's lien was deducted in making the appraisement, the land was sold at a less sum than it would have brought had the lien not been deducted. The result of this was a deficiency judgment against *Fahrenholz* on the mortgage for an amount just so much greater than it otherwise would have been. He is still personally liable to the plaintiff for the debt creating the mechanic's lien, and we think he has such

an interest in the controversy as to entitle him to insist upon subjecting the property to the lien. It is argued that he was a party to the foreclosure case and cannot be heard to dispute that record; but he is not disputing it. He is insisting that this case be adjudicated in accordance with the record, and that Oleson shall not dispute it.

The judgment of the district court is reversed and the cause remanded, with directions to take an account of the amount due on the mechanic's lien and to enter a decree of foreclosure accordingly.

Judgment accordingly

JUDICIAL SALES—DEFECTS IN APPRAISEMENT—EFFECT OF CONFIRMATION.—An order confirming a sale of real estate, by a court having jurisdiction of the parties and subject matter, cures all defects in the appraisement and sale, in the absence of fraud, and is conclusive upon the parties and their privies until reversed: *Watson v. Tromble*, 33 Neb. 450; 29 Am. St. Rep. 492, and monographic note thereto, on order confirming judicial sale. It is a final and conclusive adjudication precluding the purchaser from being released upon any ground which he might have urged before such confirmation: Note to *Hammond v. Cailleaud*, 52 Am. St. Rep. 179. He must ascertain for himself the condition of the title and of the appraisement: *Norton v. Nebraska etc. Trust Co.*, 35 Neb. 406; 37 Am. St. Rep. 441.

AUSTIN v. TECUMSEH NATIONAL BANK.

[49 NEBRASKA, 412.]

CORPORATIONS—LIABILITY OF NEW, FOR DEBTS OF OLD.—In the absence of a special agreement, a newly organized corporation is not answerable for the debts of an old corporation or firm, to whose business and property it has succeeded, unless it affirmatively appears, from the pleadings and proofs, that the transfer of the property and franchise amounts to a fraud upon the creditors of the old corporation, or the circumstances attending the creation of the new corporation, and its succession to the business, franchise, and property of the old corporation, are such as to warrant a finding that it is a mere continuation of the old corporation under a different name.

DEFINITIONS.—TO "LIQUIDATE" a balance means to pay it.

T. Appelget and J. Hall Hitchcock, for the appellant.

J. H. Ames, C. Gillespie, and S. P. Davidson, for the appellee.

415 POST, C. J. This was an action in the district court for Johnson county against the Tecumseh National Bank to recover the amount of a certificate of deposit for three hundred dollars issued by the firm of Russell & Holmes, doing business as bankers in said county. The allegations of the petition below are

that the plaintiff therein, who is also plaintiff in error, on the seventh day of November, 1888, deposited with the said firm the sum of three hundred dollars and received the certificate of deposit above described; that on the first day of June, 1889, the firm of Russell & Holmes went into liquidation and closed its business, and thereafter the Bank of Russell & Holmes, a corporation, organized pursuant to the laws of this state, engaged in the business of banking as the successor of said firm; that the corporation aforesaid was a mere continuation of the firm of Russell & Holmes, and ⁴¹⁶ as such succeeded to its business and assets of every character and assumed its liabilities. The statements therein which it is claimed connect the defendant in error with the indebtedness of Russell & Holmes as copartners, and the Bank of Russell & Holmes, a corporation, are the following: "Plaintiff further alleges that afterward, to wit, on or about the thirteenth day of April, 1890, the Bank of Russell & Holmes went into liquidation and closed its said business and ceased its organization as said Bank of Russell & Holmes, and thereupon, afterward, to wit, on or about the fourteenth day of April, 1890, the defendant was duly organized and created a banking corporation, under and by virtue of the various banking laws enacted by the Congress of the United States, known and designated as the 'National Banking Act,' and is at the present time carrying on a general banking business in the city of Tecumseh, under the name and style of the Tecumseh National Bank, as successor to the Bank of Russell & Holmes. Plaintiff further alleges that this defendant, so organized and created a banking corporation as aforesaid, came into possession of and received, as successor to the Bank of Russell & Holmes, the property, assets, emoluments, business, and goodwill of the said Russell & Holmes, and also the said sum of three hundred dollars deposited by this plaintiff as aforesaid, and this defendant thereupon became liable to the plaintiff for said deposit so received, with interest. Plaintiff further alleges that the business of this defendant was, and is, done and carried on in the same building and the same room previously occupied by the Bank of Russell & Holmes for the transaction of its business, and that all of the owners and officers of the Bank of Russell & Holmes became stockholders of this defendant upon its creation, and as such managed and controlled its business, whereby defendant assumed this indebtedness and became liable therefor. Plaintiff further alleges that the Bank of Russell & Holmes is wholly insolvent, and that it has no money or other property with which to pay those who had formerly made deposits with them and with ⁴¹⁷ Russell & Holmes." The defendant, for an-

swer, admits that it is a national bank, engaged in business as such in the city of Tecumseh as charged, and denies the other allegations of the petition. A trial was had of the issues thus joined, resulting in a verdict for the defendant in accordance with the peremptory direction of the court, upon which judgment was subsequently entered, and which it is sought to reverse by means of this proceeding.

The judgment of the district court appears to rest upon the conclusion that the plaintiff has failed to state a cause of action against this defendant, and our investigation of the subject has led to the same result. It will be observed from a careful reading of the petition that it is not charged that the Bank of Russell & Holmes became a national bank; that said corporation was reorganized under the National Banking Act or otherwise; that its liabilities, or any part thereof, were in fact assumed by the defendant herein, or that the latter did not in good faith, in the usual course of business, purchase and pay for the rights and property therein described. If, therefore, there exists a liability on the part of the defendant for the demand alleged as the cause of action, it is by reason of the fact that it has, by some means not disclosed, acquired the assets, business, and goodwill of the Bank of Russell & Holmes, and the further fact that its business was at one time conducted and carried on in the room previously occupied by that corporation, and by men who had been officers and stockholders thereof. True, it is alleged that all the owners and officers of the Bank of Russell & Holmes became stockholders and officers of the defendant upon its creation, but it does not appear that such owners and officers were the holders of the whole, or even a majority of the stock of the last-named corporation. For aught appearing to the contrary, the relation of the defendant to the Bank of Russell & Holmes is the not unusual one resulting from the purchase by one state or national banking corporation of the business and assets of another, in consideration whereof ⁴¹⁸ it assumes the liabilities of the latter equal in amount to the property so acquired. Such a transaction transgresses no provision of the state or national banking laws, and will not, in the absence of fraud, subject the purchasing bank to a liability in excess of that expressly assumed.

Our attention has been directed to the provision of the national banking law (U. S. Rev. Stats., sec. 5154) for the reorganization thereunder of banks established pursuant to general law of any state. That provision, it has been said, contemplates a mere transition from one jurisdiction to another by the corporations to which it applies, without abandoning their ex-

istence as such, without any change of organization, officers, stockholders, or property, and without interruption of their pending business or contract: *Scofield v. State Nat. Bank*, 9 Neb. 316; 31 Am. Rep. 412; *Coffey v. National Bank*, 46 Mo. 140; 2 Am. Rep. 488; *City Nat. Bank v. Phelps*, 97 N. Y. 44; 49 Am. Rep. 513. It may, as the result of the foregoing and other decisions of like import, be assumed that a liability would in this instance have been implied from an allegation that the Bank of Russell & Holmes was reorganized pursuant to the statute above cited; but the bank above named, as charged in the petition, went into liquidation, closed its business, and ceased its organization as such on or about the thirteenth day of April, 1890, and the defendant was thereafter, on or about the fourteenth day of April, 1890, organized and created a banking corporation. Judge Story, in *Fleckner v. Bank of United States*, 8 Wheat. 338, referring to the contention that the word "liquidate" meant, not a payment, but an ascertainment of a debt, said: "We think otherwise. Its ordinary sense, as given by lexicographers, is to clear away—to lessen debts. And in common parlance, especially among merchants, to liquidate a balance means to pay it," and which view accords with the more recent definitions of the term: See 13 Am. & Eng. Ency. of Law, 825. The Bank of Russell & Holmes accordingly, instead of reorganizing as a national bank, proceeded, upon the closing of its business, ⁴¹⁹ to liquidate its indebtedness, and the fact that its assets and business were subsequently acquired by this defendant will not per se operate to charge the latter, as its successor, under the provisions of the national banking law.

We have not overlooked the class of cases, including *Reed v. First Nat. Bank*, 46 Neb. 168, holding newly organized corporations liable at common law for the debts of established corporations or firms to whose business, property, and franchises they have succeeded. There are to be found in the reports and text-books expressions apparently sustaining the proposition that a corporation which, upon its organization, succeeds to the business and property of another corporation or firm, is, from that fact alone, chargeable with the indebtedness of the latter. It is, for instance, said by Mr. Beach, in his excellent work on the Law of Private Corporations, section 360: "Where an old-established corporation sells out to a newly organized one, and turns over all of its property, the new company becomes liable upon the debts and contracts of the old." The strict accuracy of that statement may, we think, be doubted, in view of the omission therefrom of any reference to the purpose or character of the

transaction contemplated or the consideration therefor. We shall not attempt a review of the cases cited in the note accompanying the foregoing text, or in the briefs submitted herewith. It is sufficient that they may, in our judgment, be thus classified: 1. Cases in which the liability of the new corporation results, not from the operation of law, but from its contract relation with the old; 2. Cases like *Hibernia Ins. Co. v. St. Louis etc. Transp. Co.*, 13 Fed. Rep. 516, in which the transfer of the property and franchise amount to a fraud upon the creditors of the old corporation; 3. Cases where, as in *Reed v. First Nat. Bank*, 46 Neb. 168, the circumstances attending the creation of the new corporation and its succession to the business, franchise, and property of the old are such as to raise ⁴²⁰ the presumption or warrant the finding that it is a mere continuation of the former—that it is, in short, the same corporate body under a different name. And the facts upon which such finding or presumption depends will not be presumed, but should affirmatively appear from the pleadings and proofs.

The judgment of the district court is right and will be affirmed.

When a Corporation Becomes Liable for the Debts of a Preceding Corporation or Partnership.*

Generally.—It is quite manifest that a mere transfer of the assets of one corporation to another does not establish any legal identity between them: *Tawas etc. R. R. Co. v. Circuit Judge*, 44 Mich. 479; *Memphis Water Co. v. Magens*, 15 Lea, 37; and it is clear that, if one corporation becomes, in any lawful mode, the owner of the property and franchises of another, it will hold the same free from the debts of the latter, which were not prior liens thereon, unless an obligation to pay them is expressly assumed: *Bruffett v. Great Western R. R. Co.*, 25 Ill. 310. Therefore, when a new corporation is formed, with different stockholders, it cannot be sued by the creditors, or be held liable for the debts of the old corporation, except upon some special ground, such as an express contract, fraud, or receiving assets of the old corporation without giving value therefor: *Donnally v. Hearndon*, 41 W. Va. 519. These special grounds will be hereafter considered specifically. A corporation cannot be sued for the debts of a firm out of which it has been organized, even though there is no difference in membership: *McLellan v. Detroit File Works*, 56 Mich. 579. In this case, a firm was reorganized into a corporation, and assets bought by the firm with the proceeds of partnership notes were transferred to the corporation. Payments on the partnership notes were made with corporation paper, and the cor-

*** REFERENCE TO MONOGRAPHIC NOTES.**

Consolidation of corporations: 79 Am. Dec. 422-4.8.

Effect of dissolution of corporation, whether by repeal of its charter or otherwise: 7 Am. St. Rep. 717-725.

What is a withdrawing of the assets of corporations: 57 Am. St. Rep. 63-84.

poration took up one of the partnership notes. It was held that these facts had no tendency to show that the corporation ratified the act of one of its officers in assuming, without authority, to take up other partnership paper with renewal notes of the corporation, and that they would not show ratification if there were no other stockholders than the original partners: *McLellan v. Detroit File Works*, 53 Mich. 579.

Assumption of Liability — Agreements. — The liability of a corporation for the debts of a partnership or corporation which it succeeds may, of course, be determined by contract: *Island City etc. Bank v. Sachtleben*, 67 Tex. 420; and liabilities assumed by the new company must be met by it: *McKeefrey v. Connelsville Coke etc. Co.*, 50 Fed. Rep. 212; *Episcopal etc. Society v. Episcopal Church*, 1 Pick. 372. A corporation may sell its property to another corporation, and if the consideration for the sale is the assumption and payment, by the corporation purchasing of mortgage debts of the corporation making the sale, to the full value of all the property conveyed, such sale will not be set aside in favor of other unsecured creditors of the corporation that made the sale; nor will they have any lien on the property for which full value has been paid in good faith: *Warfield v. Marshall etc. Canning Co.*, 72 Iowa, 636; 2 Am. St. Rep. 263. The creditors of a corporation, which has made an assignment for the benefit of creditors, release their rights under the assignment, if they consent to a plan of reorganization and accept bonds of the reorganized company in payment of their claims: *First Nat. Bank v. Radford Trust Co.*, 80 Fed. Rep. 569. If a new corporation is organized by the transfer to it of the property and business of certain original corporations, upon an agreement between the incorporators of all of them that payment for the transfer shall be made by apportioning to the original stockholders the entire stock of the new corporation not reserved for the use of the treasury, and certain stockholders in one of the original corporations bring an action against the new corporation for a delivery of its stock to them, the new corporation owes a contract duty directly to the individual incorporators, and not to their corporate entities. The action is, therefore, maintainable against the new corporation, and such stockholders are not to be turned over for relief to their own original corporation, especially where it appears that, under the agreement, all the functions of the original corporation have ceased, although it may not be wholly dead: *Anthony v. American Glucose Co.*, 146 N. Y. 407.

If there is an instrument of transfer, containing an express exception from a general liability imposed thereby, the liability of the new corporation must be determined from the instrument of transfer. Thus, if a new body corporate is formed upon the reorganization of a pre-existing corporation, and such new body accepts from the pre-existing corporation a bill of sale of its assets, in which the new corporation, in consideration of the transfer, covenants to assume the payment of all debts and obligations of the old corporation, "ex-

cepting the mortgage bonds" of the old corporation, and in which there is also an exception of all other indebtedness otherwise provided for in a certain plan or agreement or reorganization, the new corporation is not bound to pay the mortgage bonds of the old corporation: *Fernschild v. Yuengling Brewing Co.*, 15 App. Div. (N. Y.) 29.

Succession, and Consolidation or Merger.—A succession takes place when the property and franchises of a corporation are transferred to another company which takes the place of the old. It differs from a consolidation, as we shall see further on, respecting its liability for debts, for it is usually held that a consolidated corporation assumes all the liabilities of the corporations of which it is formed. That a purchaser, who acquires the property and franchises of a corporation, is not, in the absence of any special provision in the instrument of transfer, answerable for its liabilities already accrued, is not a debatable question; but, without there being any mere purchase and sale, there may be a transaction in which there are special grounds for holding a new corporation, which has succeeded an old one, liable for the debts of the old company. Thus, when one corporation goes entirely out of existence, by being incorporated into another under a new name, without any arrangement or agreement made respecting the property and liabilities of the corporation which ceases to exist, the corporation into which it is merged succeeds to all its property, and is, therefore, answerable for all its liabilities. In such a case, the debts of the old corporation become, by implication, the obligations of the new corporation: *Berry v. Kansas City etc. R. R. Co.*, 52 Kan. 774; 39 Am. St. Rep. 381; *Thompson v. Abbott*, 61 Mo. 178. So, if a corporation springs out of a partnership engaged in a general mercantile business, and the partnership business is continued by the corporation, the corporation is presumptively liable for the partnership debts where the assets and business of the partnership were transferred or assigned to the corporation and appropriated to its objects and purposes: *Reed v. First Nat. Bank*, 46 Neb. 168. And, if a corporation changes its name, but continues in the same general business with the same officers, the company under its new name is answerable for all the debts it has previously contracted: *Dean v. La Motte Lead Co.*, 59 Mo. 528. A mere change of the name of an existing corporation, either simply or by way of consolidation with other companies, does not affect the liabilities of a corporation: *Memphis Water Co. v. Mogens*, 15 Lea, 37, 43. If, by the merger of an old corporation into a new one, a novation of the debts of the old corporation is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name: *Friedenwald v. Ashville Tobacco Works*, 117 N. C. 544, 554.

There is a marked distinction between those changes above noticed and the consolidation of corporations. A consolidation, and not a mere purchase by one corporation of the property of another, is effected where all of the property, stock and franchises of the old corporation are bodily transferred to the new corporation under an ar-

rangement by which the stock of the new company is issued to the stockholders of the old company in exchange for their stock: Chicago etc. Ry. Co. v. Ashling, 160 Ill. 373, 381. The consolidation of two corporations into one new one ends their separate existence, and vests all their effects and franchises in the new company; and, for the purpose of answering for the liabilities of the two companies, the new one shall be deemed to be merely the same as each of its constituents; their existence continued in it under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company the same as if no change had occurred in its organization or name: Indianapolis etc. R. R. Co. v. Jones, 29 Ind. 465; 95 Am. Dec. 654; Board of Admra. v. New Orleans Gas Light Co., 40 La. Ann. 382; Langhorne v. Richmond Ry. Co., 91 Va. 369, 374.

The consolidated corporation not only assumes duties and obligations similar to those of the former corporations, but is answerable for the very identical liabilities and obligations incurred by either of the former companies: Board of Admra. v. New Orleans Gas Light Co., 40 La. Ann. 382. But the foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations must rest, it has been held, on agreement, express or implied: Houston etc. R. R. Co. v. Shirley, 54 Tex. 125. A corporation created by consolidation, or the surviving corporation, where another or others are merged into it or consolidated with it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name, or under the name of the surviving company, for their debts as if no change had been made in the name, or in the organization of the original corporations: Langhorne v. Richmond Ry. Co., 91 Va. 369, 374. A corporation cannot, by becoming merged into another organization, relieve itself, or perhaps, the corporators individually, from responsibility to those to whom it or they may be indebted, but it may, by such act, become so situated as to be estopped from claiming that it remains undissolved: Carey v. Cincinnati etc. R. R. Co., 5 Iowa, 357, 367.

If vessels and other property used by two different corporations are united and a new corporation is formed, in which no money is paid by either party, but arrangements are made in the contract of consolidation for the payment of the debts of one or both before any dividends shall be declared on the new stock, the new corporation cannot avail itself of the rule for the protection of purchasers without notice, for the circumstances do not show a mere sale of the property; and it therefore follows that a lien three and one-half years old may be enforced against one of the vessels transferred to the new corporation; The Key City, 14 Wall. 653. But if two companies are united into a new one, a judgment for damages against the old company cannot be enforced in equity against its former property in the hands of the new company, transferred before the time when the alleged cause of action arose: Gray v. National S. S. Co., 115 U. S. 116. A corporation formed by the consolidation of two corporations

of different states may be sued in the federal courts, as a citizen of one of such states, by a citizen of the other: *Williamson v. Krohn*, 66 Fed. Rep. 655.

Corporations are sometimes consolidated by authority of statute: *Union Canal Co. v. Young*, 1 Whart. 410; 30 Am. Dec. 212; *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *Racine etc. R. R. Co. v. Loan etc. Co.*, 49 Ill. 331, 95 Am. Dec. 595; and the liability of the new company for the debts of the old necessarily depends upon the terms of the statute as well as the act of the companies consolidating: *Chicago etc. Ry. Co. v. Ashling*, 160 Ill. 373; *McMahan v. Morrison*, 13 Ind. 172; 79 Am. Dec. 418. In such consolidations, "there has been some question," says Buchanan, J., delivering the opinion of the court in *Langhorne v. Richmond Ry. Co.*, 91 Va. 369, whether the consolidated company could be sued in an action at law for the liabilities of the companies composing it, or whether the proceeding must be in equity. But the better view seems to be that when a consolidation has been authorized and made, it confers all the rights, property, and franchises of the old company upon the new or consolidated company, and subjects it to all the liabilities of the old companies; and an action at law may be brought against the new or consolidated company for the debts or torts of the old companies. The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been injured to resort to a stranger for satisfaction, but whether it empowers the creditor, or the person injured, to resort, if he desires to do so, in the first instance, to the corporation which, by the terms of the consolidation, is made liable to him. The privity, some cases say, necessary to support this action, is created by the statute authorizing the consolidation and the purchase and conveyance under it. Other authorities place the right to bring such action on the ground that the effect of the consolidation is, as to the liabilities of the old company, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation." Hence, if "by authority of law and the act of the parties, the consolidated corporations are molded into one with none of their rights impaired, and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old to compel payment of liabilities. It avoids circuitry of action. It allows the party with whom the contract was made, or to whom the injury was done, to proceed directly against the corporation which, by virtue of the consolidation proceedings, is made liable for it": *Langhorne v. Richmond Ry. Co.*, 91 Va. 369, 375. The consolidation of corporations is the subject of a monographic note to *McMahan v. Morrison*, 79 Am. Dec. 422-428.

Following Assets — Fraud.—It is obvious that, where a new corporation is formed, the creditors of the old corporation do not, without something further being done, become creditors of the new corporation. But something is done where the new company takes the

assets of the old one. It is denied, in Massachusetts that the creditors of the old corporation can, in such a case, maintain an action at law against the new corporation on the ground that there is no privity of contract: *Ewing v. Composite etc. Co.*, Mass., June, 1897. But in that state and elsewhere the equitable right to follow the assets of the old corporation is upheld in courts of chancery. Equity will not permit corporations to consolidate, or the stockholders of one corporation to organize another, and transfer all the corporate property of the former to the latter, without paying all the corporate debts; and, if such a consolidation or transfer is made, the obligations of the old corporation may be enforced against the new one to the extent of the assets received by it: *Hibernia Ins. Co. v. St. Louis etc. Transp. Co.*, 13 Fed. Rep. 516; *Harrison v. Union Pac. Ry. Co.*, 13 Fed. Rep. 522; *Slattery v. St. Louis etc. Transp. Co.*, 91 Mo. 217; 60 Am. Rep. 245; *Ewing v. Composite etc. Co.*, Mass., June, 1897. A new corporation which takes, as owner, all the property and assets of an old corporation, which is dissolved without providing for all its debts, must pay the debts of the old corporation, at least to the amount of the assets converted: *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140.

The equitable right to follow the assets of a corporation, where its debts are unpaid, is peculiarly strong in cases of fraud. Thus, if one corporation sells its property to another, thereby forming a new corporation composed mostly, if not wholly, of the same persons, the transaction is fraudulent and void as to the creditors of the old corporation not assenting thereto, and persons who held stock in the new corporation, solely in consideration of their claims as creditors of the old one, are chargeable with notice of the fraud, and are not innocent purchasers as against execution creditors of the old corporation who did not assent to the change. The latter may follow the specific property of the old corporation, as in other cases of transfers fraudulent as to creditors: *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585; 19 Am. St. Rep. 663. So, if persons doing business as copartners, and indebted as such, form a corporation for the purpose of defrauding their creditors, and to that end convey all the property of the partnership to the corporation in consideration of its capital stock issued to them and members of their families, their judgment creditors may maintain a suit in equity to have the formation of the corporation declared fraudulent as against the complainants, and that they have a lien on the property so transferred for the satisfaction of their indebtedness: *Metcalf v. Arnold*, 110 Ala. 180; 55 Am. St. Rep. 24. And if the managing members of an embarrassed firm unite in forming a corporation under the general law, and then transfer to it the property of the partnership, the transaction is fraudulent as to existing creditors, and the property so transferred may be taken in execution as that of the former firm; the creditors of the new corporation have no priority of claim to the property in its possession: *Booth v. Bunce*, 33 N. Y. 139; 88 Am. Dec. 372. If the property of a corporation has been fraudulently conveyed to a new com-

pany, without provision being made for creditors of the old company, they may follow the assets in the hands of the new company, if the rights of innocent purchasers have not intervened: *Vance v. McNabb*, 92 Tenn. 47. If a corporation, after contracting debts, fraudulently transfers to another corporation all of its property, a suit in equity to obtain a decree for a money judgment against the latter may be maintained by a creditor of the former, without first obtaining a judgment at law, where the transferee had notice of the indebtedness: *Hibernia Ins. Co. v. St. Louis etc. Transp. Co.*, 3 McCrary, 868. Stockholders who have had full knowledge of a plan of reorganizing a corporation, who have given it their approval, and who have subscribed to its provisions respecting a part of the stock owned by them, are, however, estopped, after the reorganization is complete, from attempting to destroy the results which they, in common with other stockholders, assisted in creating: *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830, 857.

Banks.—A state bank cannot escape any of its liabilities by reorganizing as a national bank: *Coffey v. National Bank*, 46 Mo. 140; 2 Am. Rep. 488. Neither can a national bank by reorganizing as a state bank: *Eads v. Exchange Bank*, 79 Mo. 182. When a bank becomes insolvent, it may, under a proper contract, transfer its assets to a new association, which may continue a similar business without incurring liability for the debts of the insolvent corporation. If, however, the shareholders of the insolvent bank agree with a new set of shareholders that the latter shall be substituted to the rights of the former in the corporate property and franchise, in consideration of their agreement to pay the debts to a specified amount, and the new company, in its business, uses the seal of the insolvent bank, it is answerable for its unpaid debts: *Island City Sav. Bank v. Sachtleben*, 67 Tex. 420.

A national bank association organized from a state bank, and which receives its assets, is liable for its debts: *Thorp v. Wegefarth*, 56 Pa. St. 82; 93 Am. Dec. 789. The conversion of a state bank into a national bank does not destroy its identity or its corporate existence, nor discharge it as a national bank from its liability to holders of its outstanding circulation, issued in accordance with state laws: *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520. So, where a state bank has been robbed and a reward is offered for the money and the thief while the institution is a state bank, an action for the reward may be sustained against the institution after it becomes a national bank, for the national bank is answerable for all the liabilities of the state bank: *Kelsey v. National Bank*, 69 Pa. St. 426.

As the conversion of a state bank into a national bank, with a change of name, under the national banking act, does not affect its identity, or destroy its liability for the obligations of the state bank, it follows, reversely, that it has a right to sue upon liabilities incurred to it by its former name: *Michigan Ins. Bank v. Eldred*, 143 U. S. 293. A national bank, changed from a state bank, may maintain an action on a continuing guaranty for loans, held by it before

the change, for loans both before and after the change: *City Nat. Bank v. Phelps*, 97 N. Y. 44; 49 Am. Rep. 513. It may also maintain an action to foreclose a mortgage of real estate executed to the state bank as security for a note, and assigned to it by the state bank on the formation of the national bank: *Scofield v. State Nat. Bank*, 9 Neb. 316; 31 Am. Rep. 412.

The mere receipt by the officers of a new bank of the bills of an old bank of the same name, and paying out the same bills does not impose any liability upon the new bank to pay all the bills of the old bank: *Bellows v. Hallowell Bank*, 2 Mason, 81; *Wyman v. Hallowell Bank*, 14 Mass. 58; 7 Am. Dec. 194. But where a state bank, chartered by special act of the legislature, becomes insolvent, suspends business, and compromises with all of its depositors, except one, on the basis of seventy-four cents on the dollar; where it transfers all of its assets, including its name and franchise to a new association, in about two months after the suspension; where the old association obligates itself to pay back to the new association any amount it may be compelled to pay in excess of the seventy-four per cent compromise, the new association agreeing to pay for the old association any such amount; where the new association resumes business under the old name and franchise; and where the depositor who refused to accept the compromise sues the bank as reorganized, it is answerable to the plaintiff for the full amount of his debt, as the unpaid obligations incurred by the original bank, and which existed at the time of insolvency, continued to exist against it when reorganized. The principle is, that the artificial person, the body corporate, remains the same, and cannot divest itself of its liabilities by a change of membership or a reorganization: *Island City Sav. Bank v. Sachtleben*, 67 Tex. 420.

Railroads.—The principles above discussed have been most frequently applied in cases involving the succession or consolidation of railroad corporations. The mere fact that one railroad company succeeds another does not, of itself, show that the former has become answerable for the obligations of the latter: *Texas Cent. Ry. Co. v. Lyons*, Tex. Civ. App., February, 1896; *Wright v. Milwaukee etc. Ry. Co.*, 25 Wis. 46; but it is well settled that where two railway companies consolidate, the new company thus formed succeeds to the ownership of the two roads, together with all other property, effects, rights, and franchises held or enjoyed by either of the old companies: *People v. Louisville etc. R. R. Co.*, 120 Ill. 48; *Cashman v. Brownlee*, 128 Ind. 266; *Louisville etc. Ry. Co. v. Boney*, 117 Ind. 501, 505; and the new company becomes subject to all the liabilities and burdens of such old companies, and each of them, which are imposed by law on such companies. This includes not only debts, but torts, in the absence of all evidence or stipulations to the contrary: *People v. Louisville etc. R. R. Co.*, 120 Ill. 48; *Columbus etc. Ry. Co. v. Powell*, 40 Ind. 87; *Coggin v. Central R. R. Co.*, 62 Ga. 685; 35 Am. Rep. 132; *Berry v. Kansas City etc. R. R. Co.*, 52 Kan. 759; 39 Am. St. Rep. 371; *Warren v. Mobile etc. R. R. Co.*, 49 Ala. 582; *Louisville etc. Ry. Co. v.*

Boney, 117 Ind. 501, 505; Miller v. Lancaster, 5 Cold. 514; Plainview v. Winona etc. R. R. Co., 36 Minn. 505. Combining railroad companies cannot, by any contract between themselves, conclude the rights of persons who have been injured by their torts: State v. Baltimore etc. R. R. Co., 77 Md. 489. Compare Whipple v. Union Pac. Ry. Co., 28 Kan. 474. It is an open question in some jurisdictions whether or not, in the absence of a statute, the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corporation; but it seems to be generally considered that the act of consolidation involves an implied assumption by the new company of all the valid debts and liabilities of the consolidated companies: Louisville etc. Ry. Co. v. Boney, 117 Ind. 501, 504. The fact of consolidation made by railroad companies, pursuant to law, of itself implies, as between the companies, assent to a transfer, and acceptance of the rights and liabilities as declared by the statute: Miller v. Lancaster, 5 Cold. 514. Hence the rule which the authorities support seems to be that, where one corporation goes entirely out of existence by being annexed to, or incorporated into another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the corporation into which it is merged will succeed to all its property, and be answerable for all its liabilities: Louisville etc. Ry. Co. v. Boney, 117 Ind. 501, 505; Thompson v. Abbott, 61 Mo. 173; Mount Pleasant v. Beckwith, 100 U. S. 514; Pullman Car Co. v. Missouri Pac. Co., 115 U. S. 587; Miller v. Lancaster, 5 Cold. 514; Plainview v. Winona etc. R. R. Co., 36 Minn. 505; Montgomery etc. R. R. Co. v. Boring, 51 Ga. 582.

The effect of a statutory consolidation, or consolidation authorized or ratified by statute, is practically to dissolve the old corporations, and to create a new one to take their place, property, and franchises subject to the then existing obligations of the old companies: Louisville etc. Ry. Co. v. Boney, 117 Ind. 501, 504; Pullman Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587; People v. Louisville etc. R. R. Co., 120 Ill. 48; Berry v. Kansas City etc. R. R. Co., 52 Kan. 750; 39 Am. St. Rep. 371; Tysen v. Wabash Ry. Co., 15 Fed. Rep. 763; Louisville etc. Ry. Co. v. Blythe, 09 Miss. 989; 30 Am. St. Rep. 599; Bishop v. Brainerd, 28 Conn. 289; Mobile etc. Ry. Co. v. Gilmer, 35 Ala. 422; Fortescue v. Lostwithiel etc. Ry. Co., (1894) 3 Ch. 621. Thus, a consolidated railroad company is not relieved from liability upon a judgment rendered against one of the old companies after the consolidation, upon a cause of action accruing before the consolidation on the ground that the original liability is merged in the judgment, which is a new debt accruing after consolidation: Chicago etc. Ry. Co. v. Ashling, 100 Ill. 873. Unsecured debts of the old companies remain unsecured debts of the consolidated company: Tysen v. Wabash Ry. Co., 15 Fed. Rep. 763. If the articles of consolidation provide that the new company shall assume the debts and liabilities of the old companies, and shall assume and carry out all their unexecuted contracts, and the act of the legislature, ratifying and confirm-

ing the consolidation, saves the rights and remedies of creditors, a person who performed labor under a contract with one of the old companies may maintain an action against the consolidated company to recover the amount due him under his contract: *Western Union R. R. Co. v. Smith*, 75 Ill. 496; *Columbus etc. Ry. Co. v. Skidmore*, 69 Ill. 506. The consolidated company is liable for all debts of the old companies which it has expressly assumed: *St. Louis etc. R. R. Co. v. Miller*, 43 Ill. 199; *Taylor v. Atlantic etc. R. R. Co.*, 57 How. Pr. 26; *Bishop v. Brainerd*, 28 Conn. 289. Under the Minnesota statute, one railroad company which purchases the property and franchises of another railroad company is answerable for the latter's liabilities, including a claim of damages for the illegal procurement and negotiation of certain bonds: *Plainview v. Winona etc. R. R. Co.*, 36 Minn. 505; and where two or more railroad corporations are consolidated under the statutes of New York, the bonded indebtedness of either, although secured by mortgage upon its property and franchises, attaches to and may be enforced against the new corporation. The excepting of mortgages from the liabilities which, by the terms of a specific section of such statutes, are made to attach to the new corporation does not also except the bonds or the debt to which the mortgage is a collateral security, and the bondholder is not confined, in the collection of his bond, to the enforcement of the security. The words "except mortgages," in the New York act, simply confine the property lien created by a mortgage to the property owned prior to the consolidation by the company giving it. The theory of that act is, that the new corporation represents each of the old ones in its claims and liabilities, except as to the liabilities created by mortgage, and as to these the properties acquired by the new corporation remain affected only as they were affected prior to the consolidation: *Pelham v. Fitchburg R. R. Co.*, 123 N. Y. 502. The Illinois act of 1867, pertaining to the consolidation of railroad companies, and making the consolidated company liable for all debts of each company entering into the arrangement, is not retrospective, but was designed to apply to companies which might consolidate after its passage: *Hatcher v. Toledo etc. R. R. Co.*, 62 Ill. 477. In this case, a railroad company, being authorized by its charter to borrow money and secure its payment by mortgage or deed of trust of its road, property, and income, but not of its franchise, executed a deed of trust on its road, property, rights, and franchise, under which the trustees sold and conveyed the same to certain parties, who organized a new company under the old name. A special act of the legislature was afterward passed, authorizing the president of the old company to transfer the corporate franchise to the purchasers, which he did, and the old corporation ceased to exist. The purchasers at the trustees' sale having acquired a valid title to the property of the corporation without liability for any of its debts, which were not a prior lien, it was held that their rights could not be taken away or impaired by subsequent legislation; and that the consolidated company, having been created prior to the act of 1867, was not liable for the debts of the

old company: *Hatcher v. Toledo etc. R. R. Co.*, 62 Ill. 477. Under a statute which does not require the new consolidated corporation to assume the liabilities of its constituent corporations, the new corporation, having become the owner of the franchise and mortgaged property of one of the original corporations, may become purchasers of its outstanding bonds, and hold them like any other creditor, or pay and extinguish them for the relief of the mortgaged property: *Shaw v. Norfolk etc. R. R. Co.*, 16 Gray, 407.

A railroad company created and organized under and by virtue of an agreement authorized and sanctioned by competent legislative authority is bound by its provisions and all liabilities it imposes in favor of third parties. Hence, if there is a provision in such agreement that the company shall assume all liabilities of every name and nature, relating to certain lines of railroad transferred to it by such agreement, this includes debts contracted in the construction of such lines of road, and secured thereon by a trust mortgage. The company is therefore liable for their payment to the holders thereof: *Welsh v. First Division etc.*, 25 Minn. 314.

There can be no novation of the indebtedness of the constituent corporations forming a consolidated company without the consent of the creditors of those corporations; but, if the consolidated company has assumed the liabilities of its constituent companies, the creditors may elect to proceed against the new company, and recover, although they are not compelled to so proceed: *Market Street Ry. Co. v. Hellman*, 109 Cal. 571. Compare *Smith v. Chesapeake etc. Canal Co.*, 14; Pet. 45; *Longley v. Longley Stage Line Co.*, 23 Me. 39. If a consolidated railroad company assumes the payment of all debts and liabilities of the companies forming it, it becomes liable for personal injuries for which any of such companies was liable at the time of consolidation: *St. Louis etc. R. R. v. Marker*, 41 Ark. 542. So, if one railroad company condemns land for a right of way, for which damages are awarded in condemnation proceedings, but it is subsequently consolidated with another railroad company, it being provided in the instrument of conveyance that the consolidated company shall take the property subject to the just debts of the old company, the judgment rendered in the condemnation proceeding is binding upon the consolidated company: *Chicago etc. Ry. Co. v. Galey*, 141 Ind. 360.

There are cases, however, in which the new company is not liable. Thus, if the statute provides that the trustees in a deed of trust, given by a railway company upon its franchise, road, and property, shall, together with the cestuis que trust and their associates, who may purchase at a sale under the deed, incorporate under a different name from that of the old company, with power to purchase and own the franchise and property of the old company, and that it shall, upon such purchase, be invested with all the corporate powers, privileges, etc., theretofore given to the old company, but does not give the stockholders under the old company any rights in the new company, and does not require the new company to pay the debts

of the old one, the effect of the legislation is to create a new and distinct corporation, capable of purchasing, owning, and using that which was conveyed by the deed of trust, and is not a reorganization of the old company. The new company, therefore, will take its purchase, when made, clear of all liens or claims except those paramount to the deed of trust: *Morgan County v. Thomas*, 76 Ill. 120. A consolidated company is not subject to any lien in favor of bonds of one of the old companies, issued after the passage of the statutes authorizing the consolidation, unsecured by any mortgage or lien before the consolidation: *Wabash etc. Ry. Co. v. Ham*, 114 U. S. 587. If stockholders in an original company, by an arrangement subsequent to a purchase thereof and before the organization of a new company, are allowed, by legislative enactment, to become stockholders of the new company, without the payment of any money, this does not impose the debts of the old company upon the new one: *Stewart's Appeal*, 72 Pa. St. 201.

A railroad corporation which succeeds to the property and rights of another railroad corporation, through the medium of a sale upon a decree of foreclosure, or other judicial sale, is not answerable for the general debts of the corporation whose property and franchises it acquires: *Midland Ry. Co. v. Fisher*, 125 Ind. 19; 21 Am. St. Rep. 189; *Gulf etc. Ry. Co. v. Newell*, 78 Tex. 334; 15 Am. St. Rep. 788; *Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 142 U. S. 396; *Cook v. Detroit etc. Ry. Co.*, 43 Mich. 349; *Pennsylvania Transp. Co's Appeal*, 101 Pa. St. 576; *Gilman v. Sheboygan etc. R. R. Co.*, 37 Wis. 817; *Hatcher v. Toledo etc. R. R. Co.*, 62 Ill. 477; *Ferguson v. Ann Arbor R. R. Co.*, 17 App. Div. (N. Y.) 336; *Memphis Water Co. v. Magens*, 15 Lea, 87; *Smith v. Chicago etc. Ry. Co.*, 18 Wis. 17; *Vilas v. Milwaukee etc. Ry. Co.*, 17 Wis. 593; except such debt or debts as it may assume: *Lake Erie etc. Ry. Co. v. Griffin*, 92 Ind. 487. The purchaser takes the property freed from liability for existing debts not secured by prior liens and from all obligations strictly personal in character: *Gulf etc. Ry. Co. v. Newell*, 78 Tex. 334; 15 Am. St. Rep. 788. It makes no difference that the buyer is a new company organized in pursuance of a statute and authorized to buy. It is not liable for the general debts of the old company: See the cases above cited concerning judicial sales of railroad property. A charter provision that the purchasers of the property and franchises of a corporation, under mortgage foreclosure proceedings, shall be vested with all the powers and privileges, and be subject to all the duties and liabilities of the company merely imposes the burdens and obligations of the charter, and does not impose an obligation to pay the debts of the old corporation: *Memphis Water Co. v. Magens*, 15 Lea, 87. A railroad company organized under the provisions of the Wisconsin statute, with power to purchase the franchises and property of an older company previously sold under a mortgage, is not, by virtue of such purchase, an assignee of the older company, so as to be bound by any of its contracts, except such as are a lien upon or otherwise bind the property and franchises thus purchased: *Menasha v. Mil-*

waukees etc. R. R. Co., 52 Wis. 414. A person or corporation acquiring the property and franchise of a railway corporation through sale under execution takes them freed from all liability for former indebtedness not secured by prior lien, and from all mere personal obligations assumed by the former owner: *Gulf etc. Ry. Co. v. Newell*, 73 Tex. 334; 15 Am. St. Rep. 788. So a corporation to which the purchaser of railroad property at an execution sale has conveyed it is not answerable to creditors of the execution debtor, for the price paid at the execution sale: *Kittel v. Augusta etc. R. R. Co.*, 78 Fed. Rep. 855.

Cases may arise, however, in which the successor is liable in equity for the debts of its predecessor. Thus, if an old railroad company has appropriated land for the purposes of its railroad, and a judgment has been rendered against it for the value of the land appropriated or condemned, which judgment is unpaid, a new company entering upon the land and occupying it is answerable in equity for the payment of such judgment upon the principle that it has adopted and ratified the original appropriation: *Lake Erie etc. Ry. Co. v. Griffin*, 92 Ind. 487; *Pfeifer v. Sheboygan etc. R. R. Co.*, 18 Wis. 155; 86 Am. Dec. 751.

Ownership by purchase of one railroad by another railroad company does not of itself constitute a consolidation of the two without the consent of the state. This consent will not be implied, nor can it be effectual without the consent of the stockholders of the companies to be consolidated: *Gulf etc. Ry. Co. v. Newell*, 73 Tex. 334; 15 Am. St. Rep. 788. Compare *Powell v. North Missouri R. R. Co.*, 42 Mo. 68; *Mackintosh v. Flint etc. R. R. Co.*, 34 Fed. Rep. 582.

If several railroad corporations are united in one, and the property of the old companies is vested in the new one, the latter is answerable in equity for the debts of the former, at least to the extent of the property received from them: *Harrison v. Arkansas etc. Ry. Co.*, 4 McCrary, 264; but if the consolidated company is, by virtue of the consolidation, liable for the debts of the companies composing it, the creditor's remedy is complete and adequate at law, and a court of equity will not, therefore, assume jurisdiction to enforce it: *Arbuckle v. Illinois Midland Ry. Co.*, 81 Ill. 429. Where it is stipulated in an agreement which forms the basis of a consolidation authorized by statute that certain equipment bonds of the old company shall be protected by the new company, the holders of these bonds acquire the right to require the property of the company that issued them to be applied to their payment, and, if the consolidation and agreement are a matter of public record, the right is available against all persons deriving title from the consolidated company: *Compton v. Railway Co.*, 45 Ohio St. 592. For the purpose of answering for the liabilities of the old corporations, a voluntary consolidated corporation is ordinarily deemed the same as each of its constituents, and may be sued under its new name for their debts as if no change had been made in the name or organization of the original corporation: *Houston etc. R. R. Co. v. Shirley*, 54 Tex. 125, 137.

The consolidation of railroad companies does not discharge a lien against one of them: *Schutte v. Florida Cent. R. R. Co.*, 3 Woods, 692. Notice of a lien with which one of the old companies was charged also affects the consolidated company: *Schutte v. Florida Cent. R. R. Co.*, 3 Woods, 692. And a creditor having a specific lien upon the income of property which has gone from his debtor, a railroad corporation, into the hands of a consolidated company, may enforce such lien in equity: *Rutten v. Union Pac. Ry. Co.*, 17 Fed. Rep. 480. A consolidated railroad company takes the property of the original companies, burdened with all liens upon it which were valid against those companies. Hence, it will not be permitted to aver ignorance of an unrecorded mortgage previously executed by one of the original companies: *Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 58 Miss. 846. Compare *United Mines Co. v. Hatcher*, 79 Fed. Rep. 517, on the right, in equity, to enforce a mechanic's lien against consolidated mining companies. The consolidation of corporations is the subject of a monographic note to *McMahan v. Morrison*, 79 Am. Dec. 422-428, and in which the effect of railway consolidations, with respect to the liabilities of the new company, is discussed.

GREENE v. GREENE.

[49 NEBRASKA, 546.]

MARRIAGE AND DIVORCE—HUSBAND, RIGHT OF TO ALIMONY.—A husband is never entitled to alimony.

MARRIAGE AND DIVORCE—HUSBAND'S RIGHT TO ALIMONY.—A statute giving a wife a right to institute an action for divorce, does not confer upon the husband a right, in such action, to obtain alimony and maintenance, to be paid from the estate of the plaintiff.

APPEAL—OMISSION OF EVIDENCE FROM BILL OF EXCEPTIONS.—A certificate that a bill of exceptions is complete and contains all the evidence is not conclusive on that point, where the contrary is shown by the bill itself.

APPEAL—NO REVIEW AS TO SUFFICIENCY OF FINDINGS.—If a bill of exceptions does not contain all of the evidence, the sufficiency of the evidence to support the findings and decree is not open to consideration on appeal.

APPEAL—NO REVIEW OF OBJECTION NOT RAISED BELOW.—An objection, in an action by a husband against his wife for divorce, to the litigation of the husband's alleged rights in real estate, the title to which is in the name of the wife, cannot be considered on appeal, where the record does not show that the objection was made in the trial court.

John H. Ames, Sedgwick & Power, and Harwood, Ames & Pettis, for the appellant.

George B. France and N. V. Harlan, for the appellee.

547 HARRISON, J. This action was instituted in the district court of York county, by the appellee against appellant, the

objects sought being to obtain a divorce from her, and other relief in regard to certain property rights. Appellant's desertion of him was alleged by appellee as the ground for the claim of divorce. It was pleaded in the petition that the parties were married at Johnsonburg, New Jersey, October 13, 1869, and that on or about November 1, 1888, the appellant deserted appellee, and for more than two years had been willfully absent from him without just cause or reason. The petition also contained a somewhat extended account of the beginning and course of their married life, and more particularly the business and financial transactions engaged in by the appellee, and reverses therein, and the consequent changes in location, etc; and it is of the statements that appellee purchased ⁵⁴⁸ a certain tract of forty acres of land in York county and near York; also a lot in York, upon which he claims to have erected a store building; that this property belonged to appellee, but had been placed in the name of Robert Blair, contrary to the wishes and against, or in fraud of, the rights of appellee; that Robert Blair, deceased at the time of this action, made a will in which he devised the aforementioned land and lot to his three daughters—the undivided one-half interest therein to appellant, and the undivided one-half to the other two. It is pleaded in the answer, and shown by the evidence, that the two sisters of appellant afterward conveyed to her the title which they acquired to the aforesaid property. It was further set forth in the petition that there were four children, issue of the marriage, with the care, custody, and education of whom it was alleged the appellant was wholly unqualified to be trusted; that by the will of appellant's father the sum of one hundred and twenty-five thousand dollars was bequeathed in such manner that she was entitled to receive the income therefrom, amounting to six thousand dollars per annum; that appellant "is the owner of a large amount of property, as hereinbefore alleged, and the plaintiff is possessed of but little means and has but little annual income, and he is unable to perform manual labor, as he is afflicted with what is commonly known as hip-joint disease, and is unable to support himself by reason thereof, and the defendant absolutely refuses to convey that which is justly due him, or to contribute anything to his support." The prayer of the petition was as follows: "The plaintiff therefore prays that he may be divorced from the defendant, and that he may be given the custody of the said minor children, and that the defendant be decreed to pay him reasonable alimony, and to convey to him each and every part of the lands hereinbefore described, and for such other and further relief as equity may require." In her answer the

appellant set forth the purchase of the properties in and near York as having been made with money furnished by her father; that they were so purchased for ⁵⁴⁰ her, but that the title was taken in the name of her father; that after his death it was discovered that in his will she had been given the one-half interest in them, and her two sisters one-half interest; that the two sisters afterward conveyed to her all title or interest they had in the properties in York county, and the answer continued: "That prior to the beginning of this action the said plaintiff, by a certain indenture of deed, duly executed, signed, witnessed, acknowledged, and delivered with and to one Thomas Kays, as the trustee and agent of this defendant, for a good and valuable consideration, released, relinquished, and conveyed to and for the use of this defendant all his claim, right, title, or interest, or pretended claim, right, title, or interest, in or to several tracts of land and every of them, and thereby, upon consideration as aforesaid, expressly admitted and acknowledged that this defendant was the true and only owner of all the same as her own separate estate and property, free from all interest, title, or control of said plaintiff, whereby the defendant avers that this plaintiff is estopped to assert or maintain that he has, or has had since the twenty-fourth day of July, 1888, any right, title, claim, lien, or interest in or to said lands or any of them; all of which matters were and are at issue between these same parties in an action pending in the district court of York county, Nebraska, between the same parties as in this action, which other action was pending at the time this action was commenced, and has ever since been and is now so pending as hereinbefore set forth." One portion of the answer was in the nature of a cross-petition, and contained, among others, allegations of appellee's cruelty toward appellant and his family, and his unfitness to have the custody and control of the children. Appellant asked that she be granted a divorce, that she be awarded the custody of the children, and that the title to the property in controversy be quieted and confirmed in her, and some other relief, which need not be particularly noticed. To this answer and cross-petition ⁵⁵⁰ the appellee filed a denial of each and every allegation of new matter therein contained. The appellant filed a supplemental answer in which it was pleaded that of the action to which reference was made in the former answer as pending in the district court of York county between the parties thereto, and in regard to the title of the lands and property herein involved, there had been a trial and a judgment therein, favorable to appellant, by which she had been awarded the ownership and title of the

real estate drawn into controversy, and that the cause of action in that case was the same as in the case at bar. To this supplemental pleading the appellee replied, admitting the other action and that it had run its course to judgment, but alleged that the sole issue in that case was whether a contract upon which it was predicated had been made by appellant under duress. This reply was, further, a general denial of the allegations of the supplemental answer, except such as were specifically admitted. Of the issues joined there was a trial. Appellant was granted a divorce and the custody of the children. There were further findings and decree as follows: "The court further finds that the plaintiff has an equitable interest in the following described real estate, which real estate appears on the records as the property of the defendant, to wit, has an interest in lot 11, block 58, in the city of York, York county, Nebraska, according to the original plat of the town of York, and that said interest is of the value of fourteen hundred dollars. The plaintiff has also an equitable interest in the southwest quarter of the southeast quarter of section 31, township 11 north, of range 2 west, sixth post meridian in York county, the title to which also appears of record in the name of defendant, and that the interest of said plaintiff in said premises is of the value of three thousand dollars, and the said sum of fourteen hundred dollars is a valid lien on said lot, and the said sum of three thousand dollars is a valid lien on said southwest quarter of southeast quarter, section 31, township 11, range 2 west. . . . It is further ordered and adjudged by the court that the plaintiff have and recover of the defendant, ⁵⁵¹ Rachel B. Greene, the sum of four thousand four hundred dollars, the value of his equitable interest in the property hereinbefore described, and that said sum be a lien on said premises in the order named." From this latter portion of the decree this appeal has been prosecuted.

One of the questions presented is, Can alimony be allowed to the husband? Alimony is defined in 2 Bishop on Marriage and Divorce, sixth edition, section 351, as follows: "Alimony, in divorce law, is the allowance which a husband pays, by order of court, to his wife while living separate from him for her maintenance; or, it may be a like provision ordered for the sustenance of a woman divorced from the bond of matrimony, out of her late husband's estate—the latter branch of the definition denoting a form of alimony known only to the modern law, not to the ancient. It may be for the wife's use during the pendency of a suit, called alimony pendente lite, or after its termination, known

as permanent alimony': See, also, further definition in note 1 on same page. In section 469, in the same volume, the author observes: "If a husband is obliged to seek a divorce from his wife, and the property of the two is mainly, or entirely, vested for her separate use, it will, under special circumstances, be impossible to do justice without transferring to him some of this property. And perhaps there may be statutes in some of our states under which something approximating this can be done. But it cannot generally. Nor, where the common-law rules of property prevail, are the circumstances numerous in which it ought to be; because these rules put what justly belongs to the wife as well as to the husband into his hands, to be used by him for the family's support as well as his own. Yet legislation in some of the states is setting strongly in a direction ultimately to exhibit the spectacle of rich wives supporting poor husbands, and of husbands defrauding their creditors while wealth embraces them in the arms of their wives. This condition of things is for the legislatures, not the courts; but the courts, seeing these things, may ⁵⁵² also see a reason why they should not feel compunction, when, in a proper case, they withhold all allowance of alimony to the wife." "Alimony is allowed the wife in recognition of the husband's common-law liability to support her. Therefore, in the absence of legislation readjusting domestic relations and allowing it, there being no corresponding liability on the wife's part to support her husband, alimony cannot be granted him. In several of the states, however, alimony, or an allowance from the wife's estate in the nature of alimony, is allowed the husband by statute": *Am. & Eng. Ency. of Law*, 2d ed., 92. "An action for alimony cannot be maintained by the husband against the wife": *Somers v. Somers*, 39 Kan. 132; *Nelson on Divorce and Separation*, sec. 904. Unless allowed by our statute, the husband could recover no alimony.

It is argued that by virtue of the provisions of section 10, chapter 25 of the Compiled Statutes of 1895, entitled "Divorce and Alimony," that the right to recover alimony was conferred upon the husband. The section reads as follows: "A petition or bill of divorce, alimony, and maintenance may be exhibited by a wife in her own name, as well as a husband; and in all cases the respondent may answer such petition or bill without oath; and in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as is provided by law in other civil cases under the Code of Civil Procedure." Before the enactment of this section a wife was obliged to commence the action by a representative, by her

next friend, and the evident intent of the enactment was to allow her to commence the suit in her own name without the interposition of a "next friend," and the addition of the words "as well as a husband" were meant to, and do, convey no other meaning than that the wife may commence an action in the same manner as a husband, and they do not reach back and connect with the words "alimony and maintenance" and confer upon the husband the right to alimony and maintenance in an action of divorce, either of which, unless ⁵⁵³ given by this section, he could not obtain in the action. The words were but used as a part of the description of the action which the law-makers gave the wife the right to institute in her own name. It would be a strained construction which would give them the force of raising in the husband the new right to obtain alimony and maintenance in an action of divorce: *Wood v. Wood*, 8. Wend. 357. The rights of the appellee to receive any of the property, then, could not be predicated upon his claim for alimony and maintenance, but must be derived from such equities as accrued in his favor from the manner of the original purchase of the property and the subsequent improvement thereof, and his participation therein, and contributions thereto.

In relation to this branch of the case, it is asserted by appellant that there is no evidence, or at least not sufficient evidence, to support the findings and decrees of the court. To this attorneys for appellee answer that there was testimony offered and received at the trial in the district court which was not made a part of the bill of exceptions and is not presented in this court, and that it is the established rule, when such is the existent condition of the record, that the question of the sufficiency of the evidence to sustain the findings and judgment will not be examined. The record in this case discloses that the bill of exceptions was prepared and presented to the attorneys for appellee for examination and amendment and was returned to the attorney for appellant indorsed: "I herewith return this draft of a bill of exceptions in the case of Charles Greene v. Rachel B. Greene, submitted to me on the — day of —, 1893, and propose no amendments thereto." It was said by this court, in deciding the case of *Cattle v. Haddox*, 14 Neb. 59: "Where a bill of exceptions purporting to contain all the testimony is submitted to the adverse party for amendment, and such party certifies that he has no amendments to propose to the same, the court will presume that such bill contains all the evidence, notwithstanding the certificate may not ⁵⁵⁴ fully so certify"; but in *Missouri Pac. Ry. Co. v. Hays*, 15 Neb. 231, it was stated: "Where all the evidence

used on a trial is not before us, we cannot say that the finding was unsupported. It is true that the certificate to the bill of exceptions is to the effect that it is complete and contains all the evidence produced on the trial; but we find within the bill itself, in the questions and answers especially, incontestable proof that it does not. Where such is the case, the certificate will not be taken as conclusive on that point." In the bill of exceptions we find the following statement: "Plaintiff now reads in evidence depositions of Aaron Kisselbach, Euphrennia Cramer, Fanny C. Widenor, Nicholas Harris, Howard Barron," etc. The depositions which the record refers to are not in the bill of exceptions, and where the fact that evidence was used which is not incorporated in the record appears, as it does here, it must be noticed notwithstanding the certificate to the bill and the presumption arising from the indorsement of counsel hereinbefore quoted, and where the bill does not contain all the evidence used on the trial, the objection that the finding and decree of the trial court are not supported by the evidence cannot be considered. That it would not be fair or right to do so is too apparent to need argument in its support: *Chamberlain v. Brown*, 25 Neb. 434; *Aspinwall v. Sabin*, 22 Neb. 73; 3 Am. St. Rep. 258; *Nelson v. Jenkins*, 42 Neb. 133. The record before us does not disclose any objection made to the litigation of the question of the appellee's rights, if any, in the property, in this, an action of divorce. The question was presented by the pleadings, and, as shown in the record, was fully submitted to the trial court; hence we need express no opinion on it at present: *Somers v. Somers*, 39 Kan. 132; *Sherwin v. Gaghagen*, 39 Neb. 238, and cases cited.

It is urged by counsel for the appellee that the appeal from the branch of the case in respect to the property by the appellant presents the whole decree here and that the action of the trial court, in any and all particulars, is ⁵⁵⁵ open to examination and reversal or modification at the instance of either party to the cause, and further contends that there was not sufficient evidence to sustain the findings made, on which is based the decree of divorce in favor of appellant. Without discussion or decision of the presentation of this subject at this time, in an appeal which in terms was limited to one branch of the case by the party successful in the portion of the decree sought to be attacked by the opposing party, it will suffice to say that it has developed that the evidence is not all contained in the bill of exceptions, and hence the question of the sufficiency of the evidence to support the findings of the trial court is not open to consideration.

It follows from the views hereinbefore expressed and the conclusions reached that the decree of the district court will be affirmed.

ALIMONY AND ITS ALLOWANCE.—The doctrine of alimony is based upon the common-law obligation of the husband to support his wife: See monographic note to *Methvin v. Methvin*, 60 Am. Dec. 666, discussing the subject.

APPEAL.—A BILL OF EXCEPTIONS should state affirmatively that it contains "all the evidence" submitted to the trial court: *Aspinwall v. Sabin*, 22 Neb. 73; 8 Am. St. Rep. 258. If it does not purport to set out all the evidence, the appellate court cannot reverse the finding of the trial court: *Krebs Mfg. Co. v. Brown*, 108 Ala. 508; 54 Am. St. Rep. 188. A question not raised at the trial will not be considered for the first time on appeal: *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607.

ROBERTS v. ROBINSON.

[49 NEBRASKA, 717.]

HOMESTEAD—LIEN OF JUDGMENT.—A judgment is not a lien upon a homestead.

HOMESTEAD—FRAUDULENT ALIENATION—LIEN OF JUDGMENT.—If a judgment debtor and his wife convey their homestead for the purpose of having the grantee transfer it to the wife, the grantee merely holds the title in trust for her, and a deed from him to her does not burden the property with the judgment, though it was entered against the trustee as well as the homestead owner; and, in a suit to subject the land to the payment of the judgment, it is immaterial what motive influenced the homestead owner to convey to his wife, as there can be no fraudulent alienation of homestead property.

JUDGMENT—LIEN OF, ATTACHES TO WHAT INTEREST. Although the legal title to real estate is in the name of the judgment debtor, yet the lien of a judgment against him attaches only to the actual interest which he has in the real estate.

ACKNOWLEDGMENT—MISTAKE IN CERTIFICATE—VALIDITY OF DEED.—If a deed is actually signed, witnessed, properly acknowledged and delivered, it passes the legal title, for the validity of a conveyance does not depend upon whether it has been recorded. Hence, the rights of a judgment creditor of the grantor are not affected by a mistake of the notary in taking the acknowledgment in one county but certifying, by mistake, that he is a notary public of another county.

JUDICIAL SALES—DISCRETION TO SET ASIDE.—A judicial sale may be set aside for fraud or unfairness, irregularity, or disregard of the statute in making it.

JUDICIAL SALES—NO POWER TO VACATE, WHEN.—If a judicial sale has been fairly conducted and made, all the provisions of the statute complied with, the property sold for two-thirds of its appraised value, and the sale reported to the court without objections to its confirmation, it should be confirmed, and the court has no discretion to arbitrarily set it aside.

Capps & Stevens and Lewis C. Spooner, for the appellants.

J. S. Gilham, for the appellees.

718 RAGAN, C. In a justice court of Webster county William Deering & Co., in February, 1888, recovered a judgment against C. N., J. Q., and A. L. Robinson. A transcript of this judgment was at once filed and docketed in the office of the clerk of the district court of said county. In November, 1888, C. N. Robinson and his wife, Mary, conveyed by warranty deed a tract of land in Webster county to the said A. L. Robinson. In December, 1888, A. L. Robinson conveyed this real estate to the said Mary A. Robinson. Something like a year after this last conveyance C. N. Robinson and wife removed to the state of Missouri, it seems, with the intention of making that their future home; and while there, in September, 1891, sold and conveyed the real estate mentioned above to **719** one W. B. Guthrie, who took possession of the same. While C. N. Robinson owned the real estate he mortgaged it to one Roberts, and the latter brought this suit in the district court of Webster county to foreclose the mortgage. C. N. Robinson and his wife, Mary, W. B. Guthrie, the owner of the equity of redemption, and William Deering & Co. were made parties defendant. Service was obtained upon Deering & Co. by publication, and they having failed to appear, their default was entered and a decree of foreclosure rendered as prayed. In due time the land was sold by the sheriff and purchased by Deering & Co. and the sale reported to the court. After this was done, Deering & Co. made application to the court to set aside the default entered against them, alleging inter alia that their said judgment against the Robinsons was a lien upon this land, subject only to the lien of the mortgage foreclosed. The court seems to have vacated the default. Pleadings were filed and the issue made up and tried as to whether the judgment of Deering & Co. was or had ever been a lien upon the real estate. The court found and decreed that the judgment of Deering & Co. was not a lien, and had never been a lien upon the real estate involved in the foreclosure suit. Upon the court's decreeing that Deering & Co. had no lien upon the real estate, they moved the court to confirm the sale of the real estate made to them by the sheriff. This the court overruled, and upon its own motion set aside the sale. Deering & Co. have appealed from the decree of the court denying them a lien upon the real estate and from the order setting aside the sale.

1. The evidence shows without contradiction that the tract of land owned by C. N. Robinson in 1888, when the judgment of Deering & Co. was rendered, consisted of about sixty acres, was of less value than two thousand dollars, and was then occupied by himself and wife as a homestead; that in November, 1888, Rob-

inson and his wife conveyed the land to A. L. Robinson for the sole purpose of having the latter convey it to Mary Robinson, the wife of C. N., ⁷²⁰ and that in December, 1888, A. L. Robinson did convey the title to C. N.'s wife. Since this real estate was the homestead of C. N. Robinson and his wife, the judgment of Deering & Co. was not a lien upon it. The land, being a homestead, was exempt from sale on execution, and, while the judgment of Deering & Co. was an apparent lien, the homestead was not liable to be taken and sold to satisfy it. It is immaterial what the motive of C. N. Robinson was in having the title to this land vested in his wife, as that motive could not affect the conveyance. Being a homestead, it was not susceptible of fraudulent alienation (*Schribar v. Platt*, 19 Neb. 625); and C. N. Robinson and wife might sell and convey or give this homestead to whom they pleased, and no creditor of either one of them could complain of it.

But it is insisted that C. N. Robinson and wife removed to the state of Missouri after the title to the real estate was vested in the wife, with the intention of making their home in that state, and that such removal was an abandonment of the homestead, and that the land at once became liable for the judgment of Deering & Co. The fallacy of this argument is, that the real estate was then the property of Mrs. Robinson, and Deering & Co. had no judgment against her, and her property was not liable for her husband's debt.

Another argument is, that the judgment of Deering & Co. was also against A. L. Robinson, and as the legal title to this land was conveyed to him on the twenty-fourth day of November, 1888, that the judgment from that instant became a lien upon it; that it was not A. L. Robinson's homestead, and that Mrs. Robinson, by the subsequent conveyance from A. L. Robinson, took the legal title to the land encumbered with the lien of the Deering judgment. But A. L. Robinson was a trustee for Mrs. Robinson. The legal title to the land was conveyed to him for the express purpose of having him convey it to Mrs. Robinson. A. L. Robinson had, to be sure, the legal title for a few days, but he was not the owner of the land. ⁷²¹ During all the time that A. L. Robinson held the legal title, C. N. Robinson and wife were in possession. By section 477 of the Code of Civil Procedure a judgment is made a lien upon the land of the judgment debtor; that is, the land owned by him. True enough, if the record shows the legal title to land to be in the debtor, the judgment is an apparent lien upon that land, but the fact that the record shows the legal title to land to be in a debtor is not conclusi-

evidence that the debtor actually owns the real estate. The rule is, that where the legal title to real estate is in the name of the judgment debtor, nevertheless the lien of the judgment against him attaches only to the actual interest which he has in the real estate: *Uhl v. May*, 5 Neb. 157; *Metz v. State Bank of Brownville*, 7 Neb. 165; *Galway v. Malchow*, 7 Neb. 285; *Dorsey v. Hall*, 7 Neb. 460; *Mansfield v. Gregory*, 8 Neb. 432; *Berkley v. Lamb*, 8 Neb. 392; *Harral v. Gray*, 10 Neb. 186; *Dewey v. Walton*, 31 Neb. 819; *Mundt v. Hagedorn*, 49 Neb. 409. The title conveyed to Mrs. Robinson by A. L. Robinson was not, therefore, subject to the judgment of Deering & Co. The deed made by C. N. Robinson and wife to A. L. Robinson was executed and acknowledged in Nuckolls county, Nebraska, before a notary public of that county. The certificate to this acknowledgment was as follows: "State of Nebraska, Webster county, ss. On this twenty-fourth day of November, A. D. 1888, before me, Gilbert Mott, a notary public duly commissioned and qualified for and residing in said county, personally appeared," etc. It seems that writing "Webster" county instead of "Nuckolls" in the notary's certificate was a mistake, and it is now argued that the court erred in considering this deed as evidence, because the notary public did not live in Webster county, as he certified. The evidence is uncontradicted that C. N. Robinson and wife actually executed and delivered this deed and actually acknowledged it before Mott in Nuckolls county, and that he was then and there a notary public of said county. This deed, then, conveyed the legal title of these lands to A. L. Robinson. ⁷²² The mistake in the certificate may have been such as not to entitle the deed to record, but the title which A. L. Robinson took to these lands or the validity of the conveyance made in no manner depended upon whether the deed was recorded. It was signed, witnessed, acknowledged, and delivered. This was all the grantors were required to do to vest a legal title to the real estate in their grantee. The object of recording a deed is to perpetuate it as evidence. Since the real estate was a homestead, the conveyance, to be valid, was obliged to be acknowledged by both husband and wife, and it was, and was therefore valid. The appellants' rights were not affected by this mistake of the notary public in the least, as it could not possibly make any difference to them whether the deed was ever recorded. The court did not err in considering the deed as evidence in the case, and its decree denying the appellants a lien upon the land in question is affirmed.

2. The sale made of this land was regular in all respects. It was made in conformity to all the provisions of the statute. The

appellants' bid for the property was more than two-thirds of its appraised value, and no one moved to set aside the sale or objected to its confirmation. We are wholly unable to understand for what reason the district court vacated the sale. Of course, if there has been any fraud or unfairness, irregularity, or disregard of the statute in making a sale, doubtless the court is invested with the authority to set it aside; but when a sale has been fairly conducted and made, when all the provisions of the statute have been complied with, when the property has been sold for two-thirds of its appraised value, when the sale has been duly reported to the court and when no objections are interposed to its confirmation, the district court has not the discretion to arbitrarily set the sale aside, but should confirm it. The decree of the court setting aside the sale is reversed. This cause is remanded, with instructions to the district court to confirm the sale made of the real estate in question to the appellants ⁷²³ on the thirteenth day of May, 1893; to order the sheriff of said county to execute to the appellants a deed of conveyance therefor; to enter an order that the sheriff of said county, out of the proceeds of said sale, shall pay: 1. The costs of the foreclosure suit and this proceeding; 2. To the plaintiff in the foreclosure suit the amount of his decree and interest; and 3. The surplus to be paid to W. B. Guthrie, the owner of the equity of redemption of said real estate.

Decree accordingly.

HOMESTEAD—LIEN OF JUDGMENT—FRAUDULENT ALIENATION.—A judgment is no lien upon a homestead: *McDonald v. Badger*, 23 Cal. 393; 83 Am. Dec. 123; note to *Macke v. Byrd*, 52 Am. St. Rep. 653. Compare monographic note to *Vanstory v. Thornton*, 34 Am. St. Rep. 498, discussing judgment liens on homesteads. A debtor's conveyance of his homestead, exempt by law, is not considered fraudulent as to creditors, although made with a bad motive. He may sell it and give a good title, no matter how many judgments may be standing against him: Note to *Winter v. Ritchie*, 57 Am. St. Rep. 333; *Bogan v. Cleveland*, 52 Ark. 101; 20 Am. St. Rep. 158. A judgment is a lien upon the actual, not the apparent, interest of the defendant: *Burke v. Johnson*, 87 Kan. 337; 1 Am. St. Rep. 252.

DEEDS—ACKNOWLEDGMENT.—A deed is valid between the parties without attestation or acknowledgment: Note to *Brown v. Westerfield*, 53 Am. St. Rep. 556. Where a notary, taking the acknowledgment of a conveyance in one county, described himself in the body of the certificate as a notary public of that county, but signed his name as notary public of another county, the certificate was nevertheless considered, though not decided, as sufficient to authorize the deed to be read in evidence: See monographic note to *Livingston v. Kettelle*, 41 Am. Dec. 172, showing when acknowledgments of deeds are fatally defective, and when not. Acknowledgment is not generally essential to the validity of a deed as between the parties, but is required to admit the deed to record: *Westhafer v. Patterson*, 120 Ind. 450; 10 Am. St. Rep. 330; *Munger v. Baldrige*,

41 Kan. 286; 18 Am. St. Rep. 276; and note showing that a mere defective acknowledgment does not vitiate an instrument between the parties thereto.

JUDICIAL SALES—POWER TO VACATE.—The obvious policy of the law is to protect judicial sales, in the absence of fraud: *Coriell v. Ham*, 4 G. Greene, 455; 61 Am. Dec. 124.

CAPITAL NATIONAL BANK v. COLDWATER NATIONAL BANK.

[69 NEBRASKA, 781.]

BANKS—COLLECTIONS—TRUST FUND—RECEIVER.—If one bank sends a note to another for collection, and the latter, after obtaining the money, but before remitting it, goes into insolvency, and a receiver is appointed, the money so collected is a trust fund, incapable of being commingled with other funds, and must be paid, with interest, out of funds in the receiver's hands before a distribution of assets is made to the general creditors.

BANKS—COLLECTIONS—TRUST FUND—INTEREST.—Under a statute allowing interest at the rate of seven per cent per annum, "on money received to the use of another and retained without the owner's consent, express or implied," that rate may be collected on a trust fund in the shape of money collected by one bank for another, but which has passed into the hands of a receiver of the collecting bank.

Cobb & Harvey and G. M. Lambertson, for the appellants.

Pound & Burr, Darnall & Kirkpatrick, and Charles O. Whedon, for the appellees.

787 RYAN, C. There were submitted with this case on the oral argument four others which involved the same question. These were the Coldwater National Bank v. Charles E. Magoon et al., Capital National Bank v. First National Bank of Cadiz, Hayden, Receiver of the Capital National Bank v. Genesee Fruit Co., and Hayden, Receiver, v. Samuel Cupples Woodenware Co. All five of the cases had been determined adversely to the receiver of the Capital National Bank, in the district court of Lancaster county, and were in this court presented upon as many records. It is not necessary to state the facts involved in each, for the sole question presented is fully illustrated by the facts of this particular case.

The Coldwater National Bank, in October, 1892, was doing a banking business at Coldwater, Michigan. At that time the Capital National Bank was engaged in a like business in Lincoln, Nebraska. On the 22d of said month the Hemingford Bank and Job Hathaway executed their promissory note to the Capital National Bank for the sum of four thousand dollars due in ninety

days from its date. On the same day this note was indorsed, without recourse, by the payee, Charles W. Mosher, its president, and R. C. Orcutt, its cashier, and sold to the Coldwater ⁷⁸⁸ National Bank. The Hemingford Bank had with the Capital National Bank a sufficient current account to cover all the payments which it attempted to make as hereinafter described, and was not aware that the aforesaid note had been sold. On December 7, 1892, the cashier of the Hemingford Bank sent his check on the Hemingford Bank to the Capital National Bank with instructions that the same should be indorsed on the said note. This note was received by the Capital National Bank from the Coldwater National Bank for collection on January 10, 1893, and on the 20th of said month, having received two thousand five hundred dollars, the balance due thereon, the Capital National Bank returned said note, duly canceled, to the Hemingford Bank. The Capital National Bank ceased to do business on January 21, 1893, and on the next day was taken possession of by a national bank examiner, by whom its assets were soon afterward turned over to a receiver of said bank duly appointed by federal authority. It was insolvent when the examiner went into possession, and had never remitted the above four thousand dollars, or any part of it, to the Coldwater National Bank. This action was brought in equity for a judgment requiring full payment of the above four thousand dollars, with interest, out of the funds of the Capital National Bank in the hands of the receiver. On the trial it was shown that when the Capital National Bank was taken possession of by the receiver it had on hand eleven thousand dollars in cash. The district court, by its judgment, required the receiver to pay in full the said sum of four thousand dollars, with interest as prayed, on the theory that this amount was a trust fund which, as such, had come into the hands of the receiver.

It is conceded by the plaintiff in error that the relief granted by the district court was in conformity with the views expressed more or less directly by this court in *Wilson v. Coburn*, 35 Neb. 530, *Anheuser-Busch Brewing Assn. v. Morris*, 36 Neb. 31, *Griffin v. Chase*, 36 Neb. 328, and *State v. State Bank*, 42 Neb. 896, but it is urged that a re-examination of the principles involved ⁷⁸⁹ should satisfy us that these cases proceeded upon an erroneous view of the law as now settled. A very careful examination has been made of all cases cited in respect to the pivotal question which has already been sufficiently indicated as having been acted upon by the district court. Of those cited by the defendant in error the following are more or less directly in point, to wit: *Peak v. Ellicott*, 80 Kan. 156; 46 Am. Rep. 90; *Myers v. Board of Edu-*

cation, 51 Kan. 87; 37 Am. St. Rep. 263; Van Allen v. American Nat. Bank, 52 N. Y. 1; People v. City Bank, 96 N. Y. 32; Baker v. New York Exchange Bank, 100 N. Y. 31; 53 Am. Rep. 150; Cragie v. Hadley, 99 N. Y. 131; 52 Am. Rep. 9; Importers etc. Nat. Bank v. Peters, 123 N. Y. 272; Elmira Sav. Bank v. Davis, 142 N. Y. 590; Farmers etc. Nat. Bank v. King, 57 Pa. St. 202; 98 Am. Dec. 215; Harrison v. Smith, 83 Mo. 210; 53 Am. Rep. 571; Stoller v. Coates, 88 Mo. 514; Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75; Davenport Plow Co. v. Lamp, 80 Iowa, 722; 20 Am. St. Rep. 442; Independent Dist. v. King, 80 Iowa, 497; Nurse v. Satterlee, 81 Iowa, 491; Continental Nat. Bank v. Weems, 69 Tex. 489; 5 Am. St. Rep. 85; Smith v. Combs, 49 N. J. Eq. 420; Jones v. Kilbreth, 49 Ohio St. 401; First Nat. Bank v. Hummel, 14 Colo. 259; 20 Am. St. Rep. 257; In re Johnson, 103 Mich. 109; Howard v. Walker, 92 Tenn. 452; San Diego County v. California Nat. Bank, 52 Fed. Rep. 59; Massey v. Fisher, 62 Fed. Rep. 958; First Nat. Bank v. Armstrong, 36 Fed. Rep. 59; Foster v. Rincker (Wyo., Jan. 16, 1894), 35 Pac. Rep. 470; Central Nat. Bank v. Connecticut etc. Ins. Co., 104 U. S. 54; St. Louis etc. Ry. Co. v. Johnston, 133 U. S. 566; Peters v. Bain, 133 U. S. 670; Knatchbull v. Hallett, L. R. 13 Ch. Div. 696.

In the cases cited in this controversy there are two classes, one of which proceeds upon the theory that a lien may be enforced against the specific deposit so long as it can be actually identified, or should be held segregated by implication of law on account of a fraudulent concealment by the officers of the bank of its insolvent condition when receiving a very recent deposit, whereby the depositor was induced to make such deposit. The other ⁷²⁰ treats the deposit as in its essence a trust fund, incapable in its very nature of being commingled with other funds. In argument it was insisted, on behalf of the plaintiff in error, that in any event there must be an identification of the fund proposed to be charged as being composed, in part at least, of the very money which had come into the hands of the receiver. In support of this contention there were cited Wasson v. Hawkins, 59 Fed. Rep. 233, Boone County Nat. Bank v. Latimer, 67 Fed. Rep. 27, Lake Erie etc. Ry. Co. v. Indianapolis Nat. Bank, 65 Fed. Rep. 690, Northern Dakota Elevator Co. v. Clark, 3 N. Dak. 26, Standard Oil Co. v. Hawkins, 74 Fed. Rep. 395, and Spokane County v. Clark, 61 Fed. Rep. 538. These adjudications insisted upon a specific identification to entitle to equitable relief, but they are of little value in this case, because they belong in the first of the two classes above indicated. They furnish no light as to the principle applicable to the second class, and it is with that class

that we are at present concerned. As illustrative of the confusion into which it is easy to fall in this matter, we refer to Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172, cited by the plaintiff in error. In this case it was sought to impress upon a fund in the receiver's hands a trust, because as such it had been deposited in the bank, the relation of debtor and creditor being expressly disclaimed. The judge of the federal court who heard and determined this case ignored the distinction, which should have been recognized, and enforced the rule applicable where it is sought to reclaim the money actually deposited, and, a specific deposit not having been traced into the hands of the receiver, there was a denial of equitable relief. For this reason we cannot see that the Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172, should have any special weight in the determination of the question with which we are now concerned, and in this view we are in accord with the conclusions reached in Massey v. Fisher, 62 Fed. Rep. 958, as to the value of this very case.

Another adjudication in which there seems to have ⁷⁹¹ been misapprehended an opinion of the supreme court of the United States was Anheuser-Busch etc. Assn. v. Clayton, 56 Fed. Rep. 759. The opinion of the supreme court referred to was announced by Brewer, J., and held simply that where current collections had been intrusted to a bank under an agreement that on the 1st, 11th, and 21st of each month remittances of the aggregate amounts meantime collected should be made, that as to these accumulations there existed merely the relation of debtor and creditor between the bank and the party for whom such collections had been made, and that therefore no trust relation existed: Commercial Bank v. Armstrong, 148 U. S. 50. It is possible that the court of appeals, which announced its opinion on May 22, 1893, may not have noted that the supreme court, in its opinion announced on March 6, 1893, while it affirmed the opinion of the inferior court, did so upon a distinctly different ground from that upon which the inferior court had proceeded. Whether or not there was the oversight indicated, one thing is very clear to our minds, in view of the history of Commercial Bank v. Armstrong, 148 U. S. 50, and that is that the case of Anheuser-Busch etc. Assn. v. Clayton, 56 Fed. Rep. 759, is not entitled to the weight claimed for it by the plaintiff in error.

In People v. Merchants etc. Bank, 78 N. Y. 269, 34 Am. Rep. 532, cited by the plaintiff in error, there was charged on the books of the bank the amount of a draft drawn through the bank upon one of its customers, but the drawer was not accordingly credited, and this omission was held of controlling force in de-

termining that there existed between the bank and drawee the relation of debtor and creditor, and that as between the bank and the drawer there was no such relation. It seems to us that this was rather a strained statement of the relation of the parties concerned, for the bank issued and sent to the drawer above indicated its draft for the amount of the collection charged against its customer, and any entry it might have made in its books could not have more unequivocally ⁷⁹² manifested its relation of trustee toward the party by whom it had been trusted to make such collection.

In *Frank v. Bingham*, 58 Hun, 580, it was held that as the proceeds of a note intrusted to the bank for collection had not been actually traced into the hands of the receiver of the bank, there existed no right to have declared a special lien upon the assets of such bank in favor of the payee of this note. Substantially the same rule was acted upon in *Bank of Commerce v. Russell*, 2 Dill. 215, and we cannot but think that in thus denying the right to equitable relief for the reason indicated these courts too much restricted the rights of the plaintiff to equitable relief, for in each of them the relation of trustee and cestui que trust, and their incidental liabilities and rights, were completely ignored.

This completes a review of all the cases cited by the plaintiff in error which we find in any degree applicable to the question urged, and these certainly are not so convincing in their reasoning, nor so clearly in point, that, in the face of the great array of judicial determinations cited by defendant in error, we should feel bound to recede from the line indicated by the cases already decided by this court. It seems, however, to be assumed that this line has been adopted by reason of the ruling of the supreme court of Wisconsin in *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, cited with approval in some of our cases, and that the subsequent change of front by that court in *Nomotuck Silk Co. v. Flanders*, 87 Wis. 237, necessitates a corresponding tactical movement on the part of this court. In neither of these cases did the supreme court of Wisconsin act with the unanimous assent of all its members. The reasoning of the majority of the court found in *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, seemed to us very satisfactory, and it is none the less so because it is now merely questioned by another majority of that court entertaining other views. If the supreme court of Wisconsin had been a unit in either opinion it would have been valuable only as a precedent. In no sense would it

have constituted ⁷⁹³ an authority. The later reasoning of a majority of the members of that court has been carefully considered, and in it we find no sufficient argument to convince us that we should recede from the line of our former opinions.

The judgment of the district court required the payment of interest on the sum which the receiver was thereby adjudged to pay to the defendant in error. It is argued that as its claim is for specific moneys deposited, the relief must be limited to that sum, and that therefore no interest was allowable. It is probably true that this result would follow in the absence of a controlling statute, but this we need not consider, for it is provided in chapter 44 of the Compiled Statutes that interest shall be at the rate of seven dollars for each one hundred dollars, annually, "on money received to the use of another and retained without the owner's consent, express or implied." The rate of interest fixed by the district court was conformable to this legislative enactment and was, therefore, proper.

The judgment of the district court is affirmed.

BANKS—COLLECTIONS—TRUST FUND.—If one bank collects money for another bank, but fails to pay it over, and goes into insolvency, the money, though mingled with the money of the collecting bank, is treated, in many cases, as a trust fund and may be recovered from the receiver or assignee in insolvency to the exclusion of general creditors: *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; 20 Am. St. Rep. 442; *Continental Nat. Bank v. Weems*, 69 Tex. 489; 5 Am. St. Rep. 85; *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287; *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571; *Cragie v. Hadley*, 99 N. Y. 131; 52 Am. Rep. 9; *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90; upon the principle that it is sufficient to trace the money into the estate of the defaulting trustee, and that if there is so much trust money in a general heap or account, the cestui que trust is entitled to take it out, see monographic notes to *Ferchen v. Arndt*, 46 Am. St. Rep. 608; *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 129; on the right to follow and recover trust funds: *First Nat. Bank v. Hummel*, 14 Colo. 259; 20 Am. St. Rep. 257; *Farmers' etc. Nat. Bank v. Kling*, 57 Pa. St. 202; 98 Am. Dec. 215. The relation, however, created by such a transaction between banks is held, in many cases, not to be that of trustee and cestui que trust, but simply that of debtor and creditor: Note to *Sayles v. Cox*, 49 Am. St. Rep. 943; *First Nat. Bank v. Davis*, 114 N. C. 343; 41 Am. Dec. 795; *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263.

INTEREST—DETENTION OF MONEY.—As soon as it is the legal duty of one to pay a claim, he is liable for interest: *Sullivan v. McMillan*, 37 Fla. 134; 53 Am. St. Rep. 239; *Wood v. Cascade Ins. Co.*, 8 Wash. 427; 40 Am. St. Rep. 917.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY

GERBERT v. TRUSTEES.

[59 NEW JERSEY LAW, 160.]

VENDOR AND PURCHASER—BREACH OF CONTRACT TO CONVEY—DAMAGES.—Upon the breach of a contract to convey real estate, with warranty of title, nominal damages only can be recovered, where such breach is owing to the vendor's failure of title.

VENDOR AND PURCHASER—FAILURE OF TITLE—DAMAGES—IMPROVEMENTS.—If there is a contract by a landlord to convey to a tenant unimproved land, with warranty of title, and the vendee, before conveyance is to be made, erects buildings upon it, without the request of the vendor, their value cannot be recovered by the vendee, where the vendor's title fails, and an action is brought to recover damages for the breach of the contract.

Edward M. Colie, for the plaintiff in error.

James E. Howell, for the defendant in error.

178 VAN SYCKEL, J. On the 1st of March, 1884, the plaintiff's testator, John Snyder, entered into a lease with the defendant in error for premises known as No. 226 Washington street, in the city of Newark, New Jersey, for the term of five years from April 1, 1884. The lease contained a stipulation for a further term of five years, provided notice should be given by the lessee three months before the expiration of the term of the election of the lessee to take a further ¹⁷⁹ term. On the 12th of October, 1888, notice was given by the lessee that a further term was desired. No new lease was actually executed, but the lessee continued in possession of the premises after the expiration of the first term. The plaintiff's testator died in April, 1892, during the running of the second term of five years.

The lease of March 1, 1884, contained the following clause: "And, further, that if the said party of the second part shall de-

sire to purchase the demised premises, that he [the lessor] will at any time during the tenancy hereby created or agreed upon, for the consideration of seven thousand dollars, sell and convey by warranty deed, with the usual covenants, free and clear of all encumbrances, the demised premises to the said party of the second part, or such person or persons as they shall desire, upon their giving to him, his heirs, executors, or administrators, notice that they desire such conveyance; such conveyance to be made within thirty days after giving of such notice, and the payment of rent to cease at the delivery of such deed, and, if not delivered within the said thirty days, then said rent to cease at the end of that time."

After the death of Snyder, the lessor, to wit, on the first day of June, 1892, a demand was made upon the executor of Snyder for a conveyance pursuant to the aforesaid provision. He was unable to make a conveyance because the testator had a life estate only in the premises as tenant by the curtesy, the title to the property having been in the wife at the time of her decease, which was before the lease was made.

This suit was instituted for a breach of the covenant to convey pursuant to the demand made upon the lessor's executor. The sole question to be decided is the measure of damages in this action on contract.

Immediately after entering into possession under the lease, in 1884, the defendant in error built a synagogue upon the premises and expended thereon over two thousand six hundred dollars. This money was expended before a demand for a renewal of the lease and several years before a conveyance was demanded.

¹⁸⁰ On the trial below, the defendant in error recovered damages for the loss of his bargain arising out of the increased value of the land, and also damages for the loss of the building which had been erected upon the premises.

Upon the question as to damages arising from an appreciation in the value of the land, the trial judge was bound by the decision of the supreme court of this state in *Drake v. Baker*, 34 N. J. L. 358, and he properly followed that case.

The first question to be determined is whether the rule adopted by our supreme court in *Drake v. Baker*, 34 N. J. L. 358, shall be adhered to.

Under the long-settled law of this state, if Snyder had conveyed in his lifetime to his lessee with a covenant of warranty, and if thereafter the grantee had been evicted by the remaindermen, in an action on contract for damages flowing from a breach of the covenant of warranty, the only damages recoverable

would have been the consideration money paid and the interest thereon; and if the purchase money was wholly unpaid, nominal damages only could have been recovered: *Stewart v. Drake*, 9 N. J. L. 139; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Morris v. Rowan*, 17 N. J. L. 304. This rule has been so long recognized in our jurisprudence that it cannot now be subverted.

That there is no substantial difference in the injury resulting, where there is an ouster after conveyance with warranty, and where there is a refusal of conveyance in pursuance of the contract to convey, when the vendor is unable to make title, which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case, is too obvious to require discussion.

The injury in both cases is the same—the loss of the property, the loss of such profit as would have been incident to increased value. The loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title.

There can, therefore, be no solid basis for diversity in the ¹⁸¹ rule of damages applicable to the two conditions, and the rule should be unified if there is no serious obstacle in the way.

The rule in *Drake v. Baker*, 34 N. J. L. 358, was adopted upon the authority of the English cases, which at the time of the decision of that case had limited the application of the rule laid down in *Flureau v. Thornhill*, 2 W. Black. 1078, that on breach of contract to convey, where the vendor's title proved defective, nominal damages only could be recovered. The exceptions ingrafted upon *Flureau v. Thornhill*, 2 W. Black, 1078, in *Pounsett v. Fuller*, 17 Com. B. 660, *Robinson v. Harman*, 1 Wels. H. & G. 849, *Engel v. Fitch*, L. R. 3 Q. B. 314, and *Hopkins v. Grazebrook*, 6 Barn. & C. 31, all cited in *Drake v. Baker*, 34 N. J. L. 358, and there relied upon, greatly narrowed the sphere in which *Flureau v. Thornhill*, 2 W. Black. 1078, would be a controlling authority.

Since *Drake v. Baker*, 34 N. J. L. 358, was decided, this rule has been most elaborately and exhaustively discussed and reviewed in the house of lords in England, in the case of *Bain v. Fothergill*, reported in L. R. 7 H. L. 158, and the rule in England finally settled by discarding the distinctions which had been previously ingrafted upon the case of *Flureau v. Thornhill*, 2 W. Black. 1078, in the cases relied upon in our court in *Drake v. Baker*, 34 N. J. L. 358.

In *Bain v. Fothergill*, L. R. 7 H. L. 158, the defendants were in possession of a mining royalty, under a written agreement for a lease, of which they had taken an assignment from one H. In

His agreement for a lease with the owners, it was stipulated that he should not assign without their permission. The defendants contracted with the plaintiff to sell their interest in the royalty, and this action was for the breach of that contract, in consequence of the inability of the defendants to make title for want of the owners' assent to the assignment to them.

The owners were willing to consent to the assignment to the plaintiff, if he would stipulate not to assign without their permission. One of the defendants knew that this consent was necessary, the other did not.

The court of exchequer held the case to be within the ¹⁸²² rule in *Flureau v. Thornhill*, 2 W. Black. 1078, and gave judgment for nominal damages only. The case was carried to the house of lords and there affirmed. Three questions were propounded by the lord chancellor to the judges: 1. Whether upon a contract for the sale of real property, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain. To this the answer was, he is not entitled. 2. Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau v. Thornhill*, 2 W. Black. 1078. To this the answer was in the negative. 3. Whether, if the rule of law is correctly laid down in *Flureau v. Thornhill*, 2 W. Black. 1078, the circumstances of the present case distinguish it and take it out of that rule. To this the reply was also in the negative.

The discussion in *Bain v. Fothergill*, L. R. 1 H. L. 158, is most able and interesting, and after a thorough review of all the previous English cases the house of lords expressed the opinion that *Flureau v. Thornhill*, 2 W. Black. 1078, was established law, and that *Hopkins v. Grazebrook*, 6 Barn. & C. 31, was no longer the rule; that *Flureau v. Thornhill*, 2 W. Black. 1078, applied to every case where the vendor failed to convey through inability to make title; that the rule was the same whether the vendor had been guilty of fraud or not, for the motive of the defendant was immaterial in measuring damages for breach of contract, and that, therefore, even if there had been fraud, the vendee could not have recovered substantial damages in contract, but must have proceeded in an action for deceit.

The cases upon which the doctrine approved in *Drake v. Baker*, 34 N. J. L. 358, was rested, having been so completely overruled by the English court, that case should, in our judgment, be now disregarded, and the law in this state be made harmonious in the two instances, where there is in all material respects precise ¹⁸²²

similarity of circumstances, and no difference of substance, upon which to support a difference in the rule of damages.

Where fraud or deceit enters into the transaction the vendee should be left to his action for deceit to recover for the loss he may sustain thereby. On this branch of the case nominal damages only should have been recovered.

The only question submitted to this court in the case reported in *Trustees etc. v. Gerbert*, 57 N. J. L. 395, was whether the covenant to convey applied to the renewal period of five years. The rule of damages applicable to the case was not discussed, nor did the court intend to make any deliverance on that subject.

The question remains, whether the lessee was entitled to recover for the cost of the improvements put upon the premises as before stated. The first term under the lease ran from April 1, 1884, to April 1, 1889. The improvements included in the damages recovered below were all made soon after the lessee entered into possession, in 1884, and the demand for a conveyance was not made until after the lessor's death in 1892.

The lease contained the following covenant: "And the said party of the second part [the lessee] hereby agree that all improvements of any kind made on or about the said premises shall be and become the property of said party of the first part at the expiration of this lease or any renewal thereof." The covenant in the lease is simply to convey land; there is no agreement to convey land and buildings erected thereon by the lessee after entry.

Under the common-law rule, buildings erected on the premises by the tenant become part of the freehold, and are the property of the lessor without any allowance to the tenant.

An exception has been ingrafted on this rule that, under certain circumstances, gives the tenant the right of removal before the expiration of his term. But the common-law rule is still so rigidly adhered to that if a tenant, at the end of his ¹⁸⁴ term, renews his lease, and thereby acquires a new interest in the premises, his right to remove improvements is forfeited, unless he takes the precaution to reserve such right in the renewal lease.

This is the established English rule, and it has also received the sanction of the New York court of appeals, in *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, where the English cases are cited and relied upon.

In *Smith v. Administrators of Smith*, 28 N. J. L. 208, 78 Am. Dec. 49, Chief Justice Green distinguishes between a vendee in possession under a parol agreement to purchase, who makes improvements expecting them to be for his own benefit and not at

the instance of his vendor, and a tenant who makes improvements under the assurance of his landlord that he shall have a conveyance of the premises with the improvements.

In the former case he denies the right of the vendee to compensation on failure to obtain a conveyance. This accords with the doctrine of the English court as pronounced in *Worthington v. Warrington*, 8 Man. G. & S. 133. There the party entered into possession under an agreement for a two years' term, with leave to make improvements at his own expense, with the option of purchasing at any time during the two years.

The lessor, it afterward appeared, had no title to the premises, and the action was brought to recover damages for breach of the contract and for the cost of the improvements.

The court said: "If the purchaser thinks proper to enter into possession and to incur expenses in alterations before the title is ascertained, he does so at his own risk. I see nothing in this case to distinguish it from the ordinary one. The plaintiff should have taken care to ascertain that the title was good before he proceeded to lay out money upon the premises."

The reason which lies at the foundation of the rule in *Flureau v. Thornhill*, 2 W. Black. 1078, pertains here, and is clearly expressed by Lord Hatherly in *Bain v. Fothergill*, L. R. 1 H. L. 158.

In distinguishing *Engel v. Fitch*, L. R. 3 Q. B. 814, he said: "The vendor in that case was bound by his contract to do all that he could to ¹⁸⁵ complete the conveyance. Whenever it is a matter of conveyancing and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest and also by force of the interest of others whom he can compel to concur in the conveyance. The foundation of the rule in *Flureau v. Thornhill*, 2 W. Black. 1078, has been already more clearly expressed by my noble and learned friend who has preceded me in saying that having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor, and taking the property with that knowledge he is not to be held entitled to recover any loss on the bargain he may have made if, in effect, it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."

In this case, it must be held that the lessee made the improvements at his own risk, and not under an assurance that a title would be given including such improvements, inasmuch as they

were made long before the lessee announced his election to purchase. The rights of the parties must be adjudged according to the status at the time the improvements were made, and that was the relation of landlord and tenant.

The question now under discussion does not, in fact, differ from the question previously disposed of. By the renewal of the lease without any provision as to the buildings put upon the premises by the tenant, such buildings, as before stated, became incorporated with the real estate and were the property of the lessor and the remaindermen. The subsequent election of the tenant to take a conveyance gave him a right to a conveyance of the real estate of which the buildings were part, and from which they were no longer, in legal contemplation, separate. The buildings could no longer be considered as improvements made by the ¹⁸⁶ lessee. The recovery of nominal damages for failure to convey will satisfy the legal claim for damages for failure to convey both land and buildings, the two being now one and inseparable.

Where there is a contract to convey unimproved land, and the vendee before conveyance erects buildings upon it without the request of the vendor, it would be a rule of exceeding hardship which compels the vendor, when his title proves defective, to pay the cost of such improvements to any extent which the vendee might choose to put upon it. Such a result could not reasonably be supposed to have been within the contemplation of the parties when the contract was executed. The vendor would be compelled to pay for improvements which he did not authorize to be made, and from which he would derive no benefit whatever if the vendee failed to perform on his part.

In my opinion, the judgment below was also in this respect erroneous, and it should, therefore, be reversed.

VENDOR AND PURCHASER—BREACH OF CONTRACT TO CONVEY—DAMAGES.—As a general rule, a vendee can recover only nominal damages for the breach of a contract for the sale of land by the vendor, which breach is caused by the latter's defect of title: *Pumpelly v. Phelps*, 40 N. Y. 59; 100 Am. Dec. 463, and note; but compare *Kirkpatrick v. Downing*, 58 Mo. 32; 17 Am. Rep. 678, and extended note thereto.

VENDOR AND PURCHASER—DEFECT OF TITLE—IMPROVEMENTS.—Where a vendee in possession under a parol agreement for the purchase of lands makes improvements upon the premises, he cannot recover the value of such improvements in an action at law upon the refusal of the vendor to fulfill the contract: *Smith v. Administrators*, 28 N. J. L. 208; 78 Am. Dec. 49. One who buys land knowing the title to be defective buys at his own risk and is not entitled, in an action at law, to compensation from the rightful owner for improvements placed upon it: *Walker v. Quigg*, 6 Watts, 87; 31 Am. Dec. 452.

HOBOKEN PRINTING AND PUBLISHING COMPANY v. KAHN.

[59 NEW JERSEY LAW, 218.]

LIBEL.—A CORPORATION engaged in publishing a newspaper is answerable to a person libeled therein, to the same extent that an individual would be in making such a publication, where the evidence plainly justifies an inference that the libelous article was received, edited, and published by some agent of the company employed for that purpose.

LIBEL—CORPORATIONS—EXEMPLARY DAMAGES.—If a corporation engaged in publishing a newspaper libels a person therein by an article containing charges of dishonest, fraudulent, and criminal conduct, and, upon a retraction being demanded, publishes a second article which may be construed as a covert and evasive reiteration of the original charge, it is not error, in an action for the libel, to refuse to instruct the jury that no damages of a punitive or exemplary character can be allowed.

Gilbert Collins, for the defendant in error.

William S. Stuhr, for the plaintiff in error.

218 **MAGIE, J.** The writ of error in this case brings here the record of a judgment obtained by Kahn, the defendant in error, against the Hoboken Printing and Publishing Company, the plaintiff in error, in an action for libel.

A previous judgment in Kahn's favor was reversed in this court on account of the exclusion of evidence which a majority of the judges thought should have been admitted: *Hoboken Printing Co. v. Kahn*, 58 N. J. L. 359; 55 Am. St. Rep. 609.

A venire de novo having issued, Kahn obtained another verdict against the company, on which the judgment now before us was entered.

The assignments of error are directed to the conduct of the trial, and the first error alleged is, that the trial judge refused to nonsuit Kahn at the close of his case.

The bill of exceptions shows that the motion to nonsuit was **219** put on two grounds: 1. That no damages had been proven; and 2. That it had not been shown that anybody had seen the printed articles which Kahn had put in evidence beside himself.

The first article put in evidence was that on which the declaration was founded, which reads as follows:

"GONE WITH THE BOODLE.

"Gustav Kahn, who was employed as ticket taker at one of the entrances at the Eldorado, is among the missing. So is about two hundred dollars (\$200) of the gate receipts which were taken in Monday night. Detective Woods is looking for the festive Kahn, but up to date he can't be found. Kahn is said to be

sequestering himself over on Long Island. Surely the Eldorado is having trouble upon trouble."

The second article put in evidence reads as follows:

"MR. KAHN DENIES

"A Story of which Detective Woods is the Author.

"Gus Kahn is the assistant manager at the Eldorado, and says he is not and never has been ticket taker. A statement was published on Wednesday to the effect that on Monday night about two hundred dollars (\$200) of the gate receipts at the Eldorado was missing, and that Detective Woods was looking for Mr. Kahn, who, it is alleged, had gone to Long Island. Mr. Kahn called to-day at 'The Observer' office, and said there was absolutely no truth whatever in the story. He added that no money was missing, and that he has been at no time ticket taker.

"The information in the matter was given to a reporter by Detective Woods.

"Detective John Woods, when seen to-day by an 'Observer' reporter, said that he and Detective Clifford had heard from numerous persons the report that Kahn had skipped with the receipts. Detective Woods said also that he and Detective Clifford had made an investigation, and a considerable number of the employés informed them that they also had heard ^{and} the story about Kahn's sudden disappearance, and that money had gone with him. An officer of the park is willing to swear that he found the office, which Kahn had charge of, open after the park closed. It was common rumor that Kahn had gone off with the 'boodle.' An usher said, in the presence of an 'Observer' reporter and the two detectives, that he could not expect to get his pay now, as Kahn had gone off with the cash."

As the first article plainly imputed to Kahn conduct which was dishonest, fraudulent, and even criminal, evidence of any special damage was wholly unnecessary. Unless shown to be true and to have been published for the ends and motives described in our constitutional provision on the subject, the publication of the article clearly entitled Kahn to recover damages. There was, therefore, no reason to nonsuit on the ground first alleged.

In respect to the second ground relied on for a nonsuit, the bill of exceptions shows that it was afterward disclosed by the evidence that "The Observer," in which the articles in question had been published, was a newspaper printed and circulating in the city of Hoboken, from which the jury might well infer that they were seen by others who read that newspaper. Where the

ground for nonsuit is a defect in evidence which is afterward supplied, it is well settled that no reversal should follow.

The second assignment of errors is based upon an exception to a portion of the charge of the trial judge, covering a page and a half of the printed case and containing three distinct and disconnected propositions. This exception is so general that it is doubtful whether a reviewing court ought to consider the single point on which it is now argued that there was error. But that point is raised under the next assignment of errors.

The third assignment of errors is based on an exception taken to the refusal of the trial judge to charge, as requested, that the jury could not give punitive but only compensatory damages.

²²¹ That damages such as are called punitive or vindictive or exemplary may be awarded in actions of libel is a doctrine established by a long line of decisions. Mr. Addison says that wherever injury has been done to the fair fame, reputation, or character of the plaintiff, juries are generally invited to give, and are justified in giving, such a sum as marks their sense of the maliciousness or recklessness of the wrongdoer in offering the insult and injury, their belief in the groundlessness of the charge and their desire to vindicate the character of the plaintiff: Addison on Torts, 993.

I do not understand that the counsel for the company in this case challenges this doctrine. His contention rather is that there is nothing in the evidence to justify the award of exemplary damages.

Nor does he deny the liability of a corporation to an action for libel (which was settled by this court in *Evening Journal v. McDermott*, 44 N. J. L. 430, 43 Am. Rep. 392); nor that a corporation engaged in the business of publishing a newspaper will be responsible for damages done to reputation by articles published therein by agents employed for that purpose.

But the claim is, that exemplary damages may not be awarded in such a case unless the corporation approves and adopts the act of its agents in making such publication, and in support of this claim reliance is put upon the doctrine laid down by the supreme court in *Haines v. Schultz*, 50 N. J. L. 481.

It appeared in that case that the proprietor of a newspaper in which a libelous article was published was ignorant of its publication until after it had appeared. It was held that he would not be liable to punitive damages for a publication made without his knowledge or consent except upon proof of his subsequent approval of such publication.

But it is unnecessary to determine whether the doctrine of that

case is sound. A corporation engaged in publishing a newspaper obviously must act by selected agents. Its directors or managers cannot formally pass on each publication or determine what is to be admitted therein. Such determination ²²² is necessarily committed to its agents. In making such determination, they are acting within the scope of their employment. The intent with which they publish must be imputed to the corporation which employs them to make the publication of the newspaper. If the intent is malicious, the corporation must be liable therefor as it is for other tortious acts of its agents done within the scope of their authority and for the purposes for which the corporation was created and the agents were employed: *Gillett v. Missouri Valley R. R. Co.*, 55 Mo. 315; 17 Am. Rep. 653; *Samuels v. Evening Mail Assn.*, 75 N. Y. 604, approving the dissenting opinion of Mr. Justice Davis in *Samuels v. Evening Mail Assn.*, 9 Hun, 288; *Johnson v. St. Louis Despatch Co.*, 2 Mo. App. 565; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; 23 Am. Rep. 680.

Now, the proof disclosed by the bill of exceptions was that the article upon which the action was brought was written by a reporter, and that it appeared in the paper with the headline "Gone with the boodle"; that Kahn, the day following its publication, demanded of the managing or city editor a retraction of the charge against him, and that the second article thereafter appeared.

From this there was a plainly justifiable inference, to wit, that the article sued upon was received, edited, and published by some agent of the company intrusted with that duty, and that the second article emanated from and was published by someone having that power conferred upon him by the company. Upon that inference being drawn, the liability of the company is precisely the same as that which an individual would incur by publishing such articles.

Looking, then, at the first article, which charges Kahn with fraudulent and criminal conduct, a charge which the company did not pretend to justify, I think it obvious, not only that its language indicated what the law calls malice—i. e., absence of lawful excuse (*Odgers on Libel and Slander*, *265)—but that its publication in a public newspaper indicated such a wanton and reckless disregard of Kahn's right to an unchallenged reputation that the jury might have been instructed to consider whether an increase ²²³ of damages beyond those which would merely compensate him, and which would be sufficient to rebuke the malicious and reckless wrongdoer and vindicate Kahn's character, ought not to be awarded.

But clearly such an instruction was proper, when the second article is considered. This was admissible in evidence under the doctrine laid down by this court in *Evening Journal v. McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392. That it might be construed as a covert and evasive reiteration of the original charge is plain. If so, there was evidence in it of express malice and ill-will, which justified a refusal to instruct the jury that no damages of a punitive or exemplary character could be allowed.

The result is that the judgment must be affirmed.

Liability of Corporations for Exemplary Damages.*

Corporations—General Liability of, to Exemplary or Punitive Damages.—The subject of exemplary damages has been frequently discussed in the American Series of Reports, in one form or another, but not with special reference to corporations as parties defendant. Out of the supposed inability of a corporation to entertain an evil intent it was at one time supposed that a corporation could not be liable for exemplary or punitive damages. In fact, it was held not liable for a tort. But "the law of remedies against corporations originated when those artificial bodies were few, and those few were, in the main, such as were created for municipal purposes. As corporations multiplied, created chiefly for purposes of trade, the obstacles in the way of the attainment of justice, which arose out of principles applicable only to municipal corporations, have gradually been removed," and swept away: *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312, 316, per Depue, J. "A corporation," says Davis, J., in *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 49, "is liable to the same extent, and under the same circumstances, as a natural person, for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its granted powers, the wrongful transaction or act may be." See, also, the monographic note to *Orr v. Bank of United States*, 13 Am. Dec. 596-598, on the liability of a corporation for torts, showing that corporations are liable for their torts, and that this liability may be enforced.

*REFERENCES TO MONOGRAPHIC NOTES.

Liability of corporation for torts: 13 Am. Dec. 596-598.

Liability of corporation for malicious prosecution: 34 Am. Rep. 496-499.

Exemplary or punitive damages: 28 Am. St. Rep. 870-883.

Exemplary damages, allowance of, in general: 50 Am. Dec. 767-775.

Exemplary damages, liability of principal or master in, for act of agent or servant: 62 Am. Dec. 879-849.

Assault—Carrier's duty to protect passengers: 32 Am. St. Rep. 90-101.

Aggravation of damages to property: 27 Am. Dec. 684-689.

Actions for injuries to relatives: 43 Am. Dec. 619-611.

Mental anguish as element of damages: 7 Am. St. Rep. 534-537.

Newspaper libel: 15 Am. St. Rep. 334-369.

What are proper elements of damage in an action of slander or libel: 72 Am. Dec. 426-436.

Act of servant for which master is not answerable: 54 Am. St. Rep. 71-93.

ed in the same manner as if the wrong complained of had been committed by a natural person: *Hussey v. Norfolk Southern R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 812, and note.

It has sometimes been considered questionable whether damages for punishment can be given in any civil action: *Austin v. Wilson*, 4 Cush. 273; 50 Am. Dec. 766; *McKeon v. Citizens' Ry. Co.*, 42 Mo. 79; *Fay v. Parker*, 53 N. H. 342; 16 Am. Rep. 270. The doctrine of punitive damages has been, in the state of Washington, adjudged unsound in principle and unfair and dangerous in practice. They are not, therefore, allowable in that state, although a defendant corporation may have been guilty of gross negligence: *Spokane Truck and Dray Co. v. Hoefer*, 2 Wash. 45; 26 Am. St. Rep. 842. And it has been held that damages by way of punishment merely cannot be recovered in any case: *Stuyvesant v. Wilcox*, 92 Mich. 233; 31 Am. St. Rep. 580. In Colorado, exemplary damages cannot be recovered against a corporation, in a civil action, although the tort causing the injury sued for is willful, and is not punishable criminally: *Greeley etc. Ry. Co. v. Yeager*, 11 Colo. 345, 350. The great weight of authority, however, shows that exemplary or punitive damages are recoverable in a civil action: See monographic note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 870-883, on exemplary or punitive damages; and the rule now recognized is, that corporations, like individuals, may become liable for damages exemplary in character; and that they are so answerable civilly, the same as natural persons, for wrongs committed by their officers, servants, or agents, while in the course of their employment, or which are authorized, or subsequently ratified: *Pittsburg etc. R. R. Co. v. Slusser*, 19 Ohio St. 157; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; 58 Am. Dec. 430; *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85; 49 Am. Rep. 800; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672; *Brokaw v. New Jersey etc. Transp. Co.*, 32 N. J. L. 328; 90 Am. Dec. 659; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; *Atlantic etc. Ry. Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9; 72 Am. Dec. 287; *International etc. R. R. Co. v. Garcia*, 70 Tex. 207; *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858; *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277; *Henderson v. San Antonio etc. R. R. Co.*, 17 Tex. 560; 67 Am. Dec. 675.

The right to recover exemplary damages against a corporation is not confined to one form of action. They may be recovered in case as well as in trespass: *Hopkins v. Atlantic etc. R. R.*, 39 N. H. 9; 72 Am. Dec. 287.

The measure of damages in torts, whether committed by private persons or corporations, through mistake, ignorance, or mere negligence, is compensation only: *Pittsburgh etc. Ry. Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517; but as to torts committed willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely, but may, if the evidence justifies it, award vindictive or exemplary damages, whether the defendant be an individual or a corporation: *Pittsburg etc. Ry. Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St.

Rep. 517, and note; Varillat v. New Orleans etc. R. R. Co., 10 La. Ann. 88; Atlantic etc. Ry. Co. v. Dunn, 19 Ohio St. 162; 2 Am. Rep. 382; Spellman v. Richmond etc. R. R. Co., 35 S. C. 475; 28 Am. St. Rep. 858; Rucker v. Smoke, 87 S. C. 377; 34 Am. St. Rep. 758; Baltimore etc. R. R. Co. v. Blocher, 27 Md. 277; Memphis etc. R. R. Co. v. Whitefield, 44 Miss. 466; 7 Am. Rep. 699.

A corporation is liable to exemplary or punitive damages for such acts, done by its agents or servants, acting within the scope of their employment, as would, if done by an individual acting for himself, render him liable for such damages: Atlantic etc. Ry. Co. v. Dunn, 19 Ohio St. 162; 2 Am. Rep. 382; and exemplary damages, when allowed, should be proportioned to the actual damages sustained: International etc. R. R. Co. v. Telephone etc. Co., 69 Tex. 277; 5 Am. St. Rep. 45. When a cause of action is an invasion of the rights or property of a person, natural or artificial, characterized by violence, fraud, malice, wantonness, or a reckless disregard of social or civil rights, exemplary damages may be recovered against a corporation: Spellman v. Richmond etc. R. R. Co., 35 S. C. 475; 28 Am. St. Rep. 858; Samuels v. Richmond etc. R. R. Co., 35 S. C. 493; 28 Am. St. Rep. 883. Actual malice need not exist or be proved to entitle the party wronged to exemplary damages: Spellman v. Richmond etc. R. R. Co., 35 S. C. 475; 28 Am. St. Rep. 858. But the malice of a corporation may be proved by proving the motives of its directors, in the same way that the motives of other associated or conspiring bodies are proved: Goodspeed v. East Haddam Bank, 22 Conn. 530; 58 Am. Dec. 439. Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse; and the malice of an agent of a corporation, in this sense, is the malice of the corporation: Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48; 91 Am. Dec. 672. The act of an officer, agent, or servant of a corporation, when within the scope of his authority and employment, is the act of the corporation, and his negligence is its negligence: Hopkins v. Atlantic etc. R. R., 36 N. H. 9; 72 Am. Dec. 287.

Exemplary damages are, however, allowed against a corporation only in cases where the injury is intentionally, willfully, and maliciously done. There must be an element of fraud, violence, outrage, wanton recklessness, malice, evil intent, or oppression forming part of the wrongful act. If no circumstances of aggravation are shown, and no evil motive is imputed, then vindictive damages should not be awarded: New Orleans etc. R. R. Co. v. Statham, 42 Miss. 607; 97 Am. Dec. 478; McKeon v. Citizens' Ry. Co., 42 Mo. 79, 87; Peoria Bridge Assn. v. Loomis, 20 Ill. 235; 71 Am. Dec. 263; Philadelphia etc. R. R. Co. v. Hoeflich, 62 Md. 300; 50 Am. Rep. 223; Chicago v. Martin, 49 Ill. 241; 95 Am. Dec. 590; Toledo etc. R. R. Co. v. Patterson, 63 Ill. 304; McFee v. Vicksburg etc. R. R. Co., 42 La. Ann. 790; Atchison etc. R. R. Co. v. McGinnis, 46 Kan. 109; Philadelphia Traction Co. v. Orbaun, 119 Pa. St. 37; notes to Pittsburgh etc. Ry. Co. v. Lyon, 10 Am. St. Rep. 521; Stutz v. Chicago etc. Ry. Co., 9 Am. St. Rep. 777; Chicago etc. R. R. Co. v. Scurr, 59 Miss. 456; 42 Am. Rep. 373; International etc. R. R. Co. v. Garcia, 70 Tex. 207; Spellman v. Richmond etc. R. R. Co., 35 S. C. 475; 28 Am. St. Rep. 858.

Whether or not the evidence, in any particular case, tends to show

any facts to warrant exemplary damages against a corporation is a question for the court to determine by its instructions, but its sufficiency to establish such facts is a matter for the consideration of the jury: *Chicago etc. R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 273. In an action against a corporation for exemplary damages, it is the privilege and duty of the trial court to determine, in the first instance, whether or not there is any evidence in support of the allegations in issue; but it cannot go further, and decide and announce to the jury, in its instructions, that the evidence offered establishes, or does not establish, the issue. This is a question solely for the jury to decide: *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 28 Am. St. Rep. 883; *Atchison etc. R. R. Co. v. Chamberlain*, 4 Oklahoma, 542. If it is found that the injury "was wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness, the court will instruct the jury that they are at liberty to find for the plaintiff, in addition to a compensation for the injury actually sustained, such a sum as the circumstances justify": *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 28 Am. St. Rep. 883; citing *Thompson on Negligence*, 1264. On the other hand, in any and all actions against corporations for damages, where the proof fails to show anything that will warrant an imputation of willfulness, recklessness or rudeness, it has been held to be the duty of the court to inform the jury, when requested so to do, that they cannot inflict punitive damages: *Chicago etc. R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 373; but, as the doctrine of exemplary damages is capable of great practical abuse, other cases hold that it is error to instruct the jury upon the question of vindictive damages in a case clearly not warranting its application: *Pittsburg etc. R. R. Co. v. Slusser*, 19 Ohio St. 157; *Toledo etc. R. R. Co. v. Patterson*; 63 Ill. 304.

Exemplary damages against a corporation are awarded as compensation to the plaintiff for the wrong done him, and at the same time as a punishment for the tort-feasor: *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 28 Am. St. Rep. 883. They are at the discretion of the jury within reasonable limits, and it is not necessary to furnish data from which they can be ascertained with reasonable certainty: *Mobile etc. Commission Co. v. Little*, 108 Ala. 390, 407. If there is any substantial ground for allowing such damages, the pecuniary ability of the defendant company may be given in evidence: *Cumberland etc. Tel. Co. v. Poston*, 94 Tenn. 696. The jury, in cases proper for exemplary damages, are to be governed wholly by the malice or wantonness of the defendant as shown by the conduct they find him liable for in the action, in awarding them: *Note to Hoadley v. Watson*, 12 Am. Rep. 200; and they may take into consideration injury to feelings and loss of credit in estimating exemplary damages against a corporation: *Trawick v. Martin Brown Co.*, 79 Tex. 460. Compare monographic note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534-537, on mental anguish as element of damages.

Assault and Battery.—A corporation engaged as a common carrier is answerable for the malicious and wanton acts of its servant to a passenger, whether done in the line of his employment or service or not, if done during the course of the discharge of his duty to the

master which relates to the passenger. The corporation as a carrier, must protect its passengers against the violence and assaults of its own servants. If this protection is not afforded, and they, while they still remain passengers, are assaulted and beaten by a servant of the corporation, the latter is answerable for the injuries, although the servant was not acting strictly within the line of his employment and his act was not expressly or impliedly authorized by the corporation: See cases cited in the monographic note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 96, on a carrier's duty to protect passengers from assault. And the carrier, whether a steamboat, railway, or other corporation, is liable in exemplary damages for the willful, wanton, or malicious conduct of its servant in such cases: Note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 98, 99; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; 2 Am. Rep. 39; *Hanson v. European etc. Ry. Co.*, 62 Me. 84; 16 Am. Rep. 404; *Baltimore etc. R. R. Co. v. Barger*, 80 Md. 23; 45 Am. St. Rep. 319; *East Tennessee etc. Ry. Co. v. Fleetwood*, 90 Ga. 23.

It has been held, however, that no punitive damages can be assessed against the owner of a steamboat for an assault by its captain upon a passenger, if there was no ratification of the captain's act: *Mace v. Reed*, 89 Wis. 440. So, if the employés of a railway corporation, engaged in the operation of the road or the running of trains, commit an assault upon a citizen who is not a passenger upon the train or in any manner connected with the company, the corporation is not answerable for such assault: *Porter v. Chicago etc. R. R. Co.*, 41 Iowa, 358. So, a street railway company is not answerable for an assault made by one of its conductors if committed without the scope of his employment by the company: *McGilvray v. West End Street Ry.*, 164 Mass. 122. For other illustrations of a similar character, see note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 99, and "Railroads," *infra*, as to ejecting passengers.

Contempt.—Although a railway corporation disobeys an injunction order, punitive damages cannot be awarded upon proceedings for contempt, where the corporation acts bona fide and upon the advice of counsel that the order is void: *Erie Ry. Co. v. Ramsey*, 3 Lana. 178.

Contracts.—In an action, at common law, upon a contract, the motives or conduct of the party breaking the contract cannot be considered in damages except in actions for breach of promise of marriage; and the rule seems to be that a recovery for the violation of a contract, where no personal wrong is produced, is confined to actual damages, and that punitive damages cannot be assessed, especially where no bad faith is shown: *Houston etc. R. R. Co. v. Shirley*, 54 Tex. 125, 142; *Judice v. Southern Pac. Co.*, 47 La. Ann. 255. So, where a suit is upon a contract and not for a tort, it is error to charge that, if the act causing the injury for which damages are sought was done maliciously, the jury may consider that fact in arriving at what damages the plaintiff ought to recover: *Chattanooga etc. R. R. Co. v. McLendon*, 88 Ga. 517.

Libel.—A corporation is civilly liable for a libel: *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75; *Fogg v. Boston etc. R. R. Corp.*, 148 Mass. 513; 12 Am. St. Rep. 583; *Evening Journal Assn. v. McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392; *McDermott v. Evening Journal*, 43 N. J. L. 488; 39 Am. Rep. 606; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293; and it has been held that the malice of the editor of a newspaper in composing a libelous article for publication is the malice of the corporation owning and publishing the paper, and that the corporation is liable therefor: *Allen v. News Pub. Co.*, 81 Wis. 120. So, in an action against a corporation for libel, a jury is authorized to give such exemplary damages as the circumstances require, if the evidence shows that the publication was the result of that reckless indifference to the rights of others which is equivalent to the intentional violation of them: *Morning Journal Assn. v. Rutherford*, 51 Fed. Rep. 513, 515; *Cooper v. Sun Printing etc. Assn.*, 57 Fed. Rep. 566. Exemplary damages may be awarded against corporations as well as individuals when it is shown that they have published a libel with express malice, or published that which is libelous per se: *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794; *Cooper v. Sun Printing etc. Assn.*, 57 Fed. Rep. 566; *Taylor v. Hearst*, 107 Cal. 262; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447. Exemplary damages may be recovered, in such cases, when malice on the part of the defendant is established as a fact, either actually, or by presumption or inference of fact from the libelous character of the publication: *Childers v. San Jose etc. Pub. Co.*, 105 Cal. 284; 45 Am. St. Rep. 40. If an association is guilty of reprehensible negligence in publishing an article without verification of its truth, then punitive damages may be allowed: *Morning Journal Assn. v. Rutherford*, 51 Fed. Rep. 513; *Smith v. Sun Printing etc. Assn.*, 55 Fed. Rep. 240. If a publishing company prints an out of town dispatch, which is rendered libelous by an error in transmission, punitive damages will be justified, on the ground that it was a wanton disregard of the rights of others not to have the dispatch repeated to insure accuracy, although it would have involved extra expense and loss of time: *Press Pub. Co. v. McDonald*, 63 Fed. Rep. 238. So, if it appears that information of the falsity of statements contained in an article was brought home to the reporter of the defendant newspaper before the article was published, the jury may properly award exemplary damages: *Hatt v. Evening News Assn.*, 94 Mich. 114.

On the other hand, if there is no evidence that the corporation published the libel maliciously and wantonly, exemplary or punitive damages cannot be recovered: *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794. Neither are punitive damages recoverable in a libel suit where a jury decides that all the actual damages sustained are merely nominal: *Stacy v. Portland Pub. Co.*, 68 Me. 279. Nor is a corporation answerable for a libel by its agent, not in the course of his duty, and not authorized or approved by the corporation: *Southern Exp. Co. v. Fitzner*, 59 Miss. 581; 42 Am. Rep. 379.

And in some jurisdictions a corporation is not answerable in exemplary damages for a malicious criminal libel, on the ground that the defendant is subject to a criminal prosecution for the wrong as well as a civil action: *Wabash etc. Pub. Co. v. Crumrine*, 123 Ind. 89, 93. But the better opinion seems to be that the fact that the defendant either may be or has been punished in a criminal proceeding does not deprive the party injured by a criminal tort of his right to exemplary damages: See note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 882, on exemplary or punitive damages. Compare monographic notes to *McAllister v. Detroit Free Press*, 15 Am. St. Rep. 333-369, and *Terwilliger v. Wands*, 72 Am. Dec. 426-436, the first, on newspaper libel, and the other on what are proper elements of damage in an action of slander or libel.

Malicious Prosecution — Malicious Attachment. — A corporation is liable to an action for a malicious prosecution authorized by it: *Boogher v. Life Assn.*, 75 Mo. 819; 42 Am. Rep. 413; or conducted by its agents: *Williams v. Planters' Ins. Co.*, 57 Miss. 759; 34 Am. Rep. 494, and extended note. It is liable in damages for malicious prosecution under the same circumstances as an individual: *Wheless v. Second Nat. Bank*, 1 Baxt. 469; 25 Am. Rep. 783; *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 812; and the fact that the tort is ultra vires is no defense for the corporation: *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 812. Contra, *Gillett v. Missouri etc. R. R. Co.*, 55 Mo. 315; 17 Am. Rep. 653.

Negligence. — Exemplary or vindictive damages cannot be recovered against a corporation for personal injuries, either to adults or minors, if they resulted from simple negligence only as contradistinguished from gross negligence. If there is no testimony in the case showing that the negligence was so gross as to amount to wantonness, and no willful or malicious acts are proved, actual or compensatory damages merely is the rule: *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858; *Atchison etc. R. R. Co. v. McGinnis*, 46 Kan. 109; *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33; 68 Am. Dec. 586; *Hill v. New Orleans etc. R. R. Co.*, 11 La. Ann. 292; *Milwaukee etc. R. R. Co. v. Arma*, 91 U. S. 489; *Louisville etc. Ry. Co. v. Shanks*, 94 Ind. 598; *Railway v. Hall*, 58 Ark. 7; *Kentucky Cent. R. R. Co. v. Dills*, 4 Bush, 593; *Chicago etc. R. R. Co. v. McKean*, 40 Ill. 218; *Augusta Factory v. Barnes*, 72 Ga. 217; 53 Am. Rep. 838; *International etc. Ry. Co. v. Brazzil*, 78 Tex. 314; *Chicago etc. R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 378; *Atchison etc. R. R. Co. v. Chamberlain*, 4 Oklahoma, 542; *Louisville etc. R. R. Co. v. Smith*, 2 Duvall, 556; *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 671; *Chicago etc. R. R. Co. v. O'Connell*, 46 Kan. 581; *Atchison etc. R. R. Co. v. Stewart*, 55 Kan. 667; *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144; 30 Am. St. Rep. 41; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 263; 71 Am. Dec. 263; *Wardrobe v. California Stage Co.*, 7 Cal. 118; 68 Am. Dec. 231; *Cleghorn v. New York etc. R. R. Co.*, 56 N. Y. 44; 15 Am. Rep. 375; *Hurt v. St. Louis etc. Ry. Co.*, 94 Mo. 255; 4 Am. St. Rep. 374.

Exemplary or vindictive damages against a corporation, for per-

sonal injuries either to adults or minors, are allowed only in cases where the wrong is wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of wantonness or willfulness. To justify punitive or exemplary damages, in an action against a corporation to recover damages for personal injuries, the negligence established must be wanton, willful, or malicious: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858; *Hill v. New Orleans etc. R. R. Co.*, 11 La. Ann. 292; *Milwaukee etc. Ry. Co. v. Arms*, 91 U. S. 489; *Chicago etc. R. R. Co. v. McKean*, 40 Ill. 218; *Chicago etc. R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 373; *Atchison etc. R. R. Co. v. Chamberlain*, 4 Oklahoma, 542; *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 671; *Chicago etc. R. R. Co. v. O'Connell*, 46 Kan. 581; *Atchison etc. R. R. Co. v. Stewart*, 53 Kan. 667; *Cleghorn v. New York etc. R. R. Co.*, 56 N. Y. 44; 15 Am. Rep. 375; *Hurt v. St. Louis etc. Ry. Co.*, 94 Mo. 255; 4 Am. St. Rep. 374.

It is therefore improper, in such cases, to leave the question of punitive or exemplary damages to the jury, when there is no testimony which would warrant a verdict for such damages: *Kansas etc. R. R. Co. v. Kier*, 41 Kan. 671; *Atchison etc. R. R. Co. v. McGinnis*, 46 Kan. 109; *Chicago etc. R. R. Co. v. O'Connell*, 46 Kan. 581; *Louisville etc. R. R. Co. v. Smith*, 2 Duvall, 556; *Railway v. Hall*, 53 Ark. 7; but, on the contrary, they should, upon request, be instructed not to inflict punitive damages: *Chicago etc. R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 373; *Chattanooga etc. R. R. Co. v. Liddell*, 85 Ga. 482; 21 Am. St. Rep. 169.

Exemplary damages are, however, recoverable against a corporation for personal injuries caused its servants or agents, where they have been guilty not only of want of ordinary care, but of that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them: *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17; *Alabama etc. R. R. Co. v. Arnold*, 80 Ala. 600; monographic note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 878, on exemplary or punitive damages: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764; *McHenry Coal Co. v. Sneddon*, 98 Ky. 684. Notwithstanding all that has been said about negligence, it is clear that there is a middle ground between simple negligence and acts willfully done with malice, which may be termed "gross negligence," and means a greater want of care than is implied by the term "ordinary negligence": See *Milwaukee etc. R. R. Co. v. Arms*, 91 U. S. 489; *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17; and exemplary damages have been allowed against corporations for personal injuries occasioned by gross negligence as distinguished on the one hand, from willful and wanton acts intentionally done, and on the other, from cases in which the absence of care was greater than in cases of slight or ordinary negligence: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764;

Hopkins v. Atlantic etc. R. R., 36 N. H. 9; 72 Am. Dec. 287; **Taylor v. Grand Trunk Ry. Co.**, 48 N. H. 304; 2 Am. Rep. 229; **Beale v. Railway Co.**, 1 Dill. 568; **Kansas Pac. Ry. Co. v. Kessler**, 18 Kan. 523; **South etc. R. R. Co. v. McLendon**, 63 Ala. 266.

Thus, exemplary damages may be awarded in an action against a railroad corporation for personal injuries received, if the negligence was of such a character and degree as to evince a grossly careless disregard of the safety of the public. Hence, such damages may be awarded when injuries have been received by a passenger from the derailment of a train, and every other cross-tie within twenty-five to thirty feet was so rotten that the spikes could be pulled out by hand, and had been in this condition for at least two weeks, and there was evidence tending to show that the condition of such ties was known to the officers of the defendant: **Richmond etc. R. R. Co. v. Vance**, 93 Ala. 144; 30 Am. St. Rep. 41. So, exemplary damages may be awarded to one receiving personal injuries while a passenger on a railway car from its derailment, if the condition of the rails and cross-ties and the fact that old rails were being used constantly to repair the old track satisfy the jury that the rails used in the track were old and the cross-ties decayed and rotten, and that the defendant knew of their condition and was guilty of recklessness and wantonness in continuing to run trains over a track in so dangerous a condition: **Alabama etc. R. R. Co. v. Hill**, 93 Ala. 514; 30 Am. St. Rep. 65. Exemplary damages may be imposed, though there is not an entire want of care in the maintenance of a railway track upon which a passenger train is derailed, if, notwithstanding the exercise of some care, the track is consciously left in such a condition that to run trains over it would probably result in the disaster which occurred: **Alabama etc. R. R. Co. v. Hill**, 93 Ala. 514; 30 Am. St. Rep. 65.

But, after all, "gross negligence" is a relative term, and simply means the absence of care required by the circumstances: **Milwaukee etc. R. R. Co. v. Arms**, 91 U. S. 489, 495; and, in some jurisdictions, it is held that it is not every case of gross negligence that will authorize the court to give an instruction permitting the jury to award such damages; and that, while the act or omission of the corporation defendant may be grossly negligent there must be, in addition to that, some reckless, willful, or malicious conduct on its part to justify the imposition of exemplary damages: **McHenry Coal Co. v. Sneddon**, 98 Ky. 684. Thus, it is said in **Illinois Cent. R. R. Co. v. Hammer**, 72 Ill. 347, 353, that: "A private corporation cannot be liable to punitive damages merely for gross negligence of its servants. If the company employs incompetent, drunken, or reckless servants, knowing them to be such, or, having employed them without such knowledge, retains them after learning the fact, or after full opportunity to learn it, the company would no doubt be liable. Or if its servants, whilst in the employment of the company, and engaged in carrying on the business of the company, should willfully or wantonly produce injury to others, then the company would no doubt be liable to such damages. With its servants, a mere omission of duty, although grossly

negligent, should not be sufficient, but some intention to inflict the injury, or a reckless, wanton disregard for the safety of others, should appear, to warrant punitive damages": See, also, *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17.

Exemplary damages for personal injuries are, in a proper case, recoverable against a corporation although not specially claimed; *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; *Kansas City etc. R. R. Co. v. Phillips*, 98 Ala. 159; though, in South Carolina, when the cause of action is for exemplary damages, such damages, and none other, can be recovered; and when the cause of action is for actual damages, only such damages can be recovered: *Spellman v. Richmond etc. R. R. Co.*, 85 S. C. 475; 28 Am. St. Rep. 858. While exemplary damages may be given by juries in cases of willful negligence or malice, the act done or omitted must have been intended in order to constitute willful negligence. The mere neglect to keep a bridge in repair cannot, ordinarily, be alleged to be willful: *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235; 71 Am. Dec. 263. But exemplary damages against a railroad corporation are authorized from an injury to a passenger arising from an accident caused by a broken rail, when the evidence shows an unsafe condition of the track at that place so long continued as to make the failure to discover and remedy it gross negligence, or equivalent to recklessness, wantonness, or intentional wrong toward the passenger on the part of the railroad company: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764, and if a corporation inflicts an injury upon a person intentionally, or, though unintentionally, yet with a wanton and reckless disregard of its injurious consequences, it is guilty of gross or willful negligence, and the contributory negligence of the plaintiff is not a defense: *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17. So, in an action against a railroad corporation by one of its employes to recover for personal injuries, the plaintiff may recover punitive or exemplary damages if he shows that such injuries resulted from the failure of the corporation to use such diligence in keeping its track in repair as a person of common sense and reasonable skill, but of careless habit, would observe in the conduct of such a business: *Louisville etc. R. R. Co. v. Greer*, Kentucky, Feb. 7, 1895. Exemplary damages should not be awarded against a railway corporation for personal injuries occasioned by a collision, which resulted through the negligence of the employes of the company, unless it was the result of their willful misconduct, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them: *Milwaukee etc. Ry. Co. v. Arms*, 91 U. S. 459.

If the testimony, in an action for personal injuries, discloses gross and wanton negligence on the part of a defendant corporation, it is proper to instruct the jury that they may award exemplary or punitive damages: *Kansas Pac. Ry. Co. v. Kessler*, 18 Kan. 523; but where the facts proved are not evidence of gross negligence such an instruction is improper: *Bannon v. Baltimore etc. R. R. Co.*, 24 Md. 108, 124. The degree of negligence is a question for the determination of the jury, under proper instructions from the

court: *South etc. R. R. Co. v. McLendon*, 63 Ala. 206; *Bannon v. Baltimore etc. R. R. Co.*, 24 Md. 108, 124. As to actions for personal injuries, compare the monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 619-641, on actions for injuries to relatives. See, also, the subdivision, "Railroads," *infra*.

Negligence Causing Death. — In some jurisdictions exemplary or punitive damages are recoverable against a corporation for the negligence of its servants or employes, whereby injuries result which cause death, either to adults or minors, if the injuries are attended by gross negligence, or the wrongful act is willful, reckless, wanton, oppressive, or malicious. It is to be observed, however, that such damages in these cases, are generally recoverable by virtue of some statute: *Murphy v. New York etc. R. R. Co.*, 29 Conn. 496; *Richmond etc. R. R. Co. v. Freeman*, 97 Ala. 289; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135; *Louisville etc. R. R. Co. v. Kelly*, Kentucky, May, 1897; *Haehl v. Wabash R. R. Co.*, 119 Mo. 325; *Kentucky Cent. R. R. Co. v. Gastineau*, 83 Ky. 119. And such recovery may be had whether the injury to the deceased caused instantaneous death or not: *Haley v. Mobile etc. R. R. Co.*, 7 Baxt. 239. It is error, in fact, for the court, in a suit against a corporation for negligent injury, causing the instantaneous death of a person, to instruct the jury that exemplary or punitive damages are recoverable if the injury was attended by gross negligence of the defendant: *Railway Co. v. Daughtry*, 88 Tenn. 721. Of course, no such damages can be recovered unless a proper case is made out: *Kansas etc. Ry. Co. v. Outter*, 19 Kan. 83.

In other jurisdictions, exemplary or punitive damages are not allowable in such cases, and a recovery is confined to actual or compensatory damages. It is, therefore, error to instruct the jury that they may allow exemplary damages, if the act causing death was wanton, cruel, and malicious: *McGown v. International etc. Ry. Co.*, 85 Tex. 289; *Houston etc. Ry. Co. v. Cowser*, 57 Tex. 293; *Huntingdon etc. R. R. Co. v. Decker*, 84 Pa. St. 419; *Potter v. Chicago etc. Ry. Co.*, 21 Wis. 372; 94 Am. Dec. 548; *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 300; 74 Am. Dec. 259; *Lange v. Schoettler*, 115 Cal. 388. The doctrine of punitive damages should be the same in cases where death ensues from acts of negligence on the part of a corporation, its servants or employes, as where it does not ensue: *Turner v. Norfolk etc. R. R. Co.*, 40 W. Va. 675, 693. Compare the monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 632-641, discussing actions for injuries resulting in death.

Trespass. — Exemplary damages are not recoverable against a corporation in every action of tort, but only in those where a bad motive is shown. They are not recoverable for every trespass, by a corporation, on land of which the defendant is guilty, but only where it is committed through malice, or is accompanied by threats, oppression or rudeness to the owner or occupant. Punitive damages are not allowed where there have been good faith and a mistake only as to authority: *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. C. 648, 655; *Silver Creek etc. Co. v. Mangum*, 64 Miss. 682, a case of destroying a ford and flooding land. If there is neither fraud, malice, gross negligence, or oppression, damages will be confined

to compensation for the plaintiff's injury: *Belknap v. Boston etc. R. R.*, 49 N. H. 358. If his land is uninclosed and unoccupied and is surrounded on three sides by the timber land of a corporation, from which timber is being cut and hauled, the fact that the defendant company hauls across the plaintiff's land, thereby cutting ruts in it, does not justify an award of exemplary damages: *Keystone etc. Imp. Co. v. McGrath*, Mississippi, Feb. 1897.

Exemplary damages may, however, under some circumstances, be given, in an action of trespass *quare clausum fregit*, against corporations as well as others, and a corporation may maintain such an action: *Greenville etc. R. R. Co. v. Partlow*, 14 Rich. 237. In an action against a state board of live-stock commissioners and their servants for slaughtering plaintiff's horses as glandered, when in fact they were not, where the evidence shows that the trespass was committed in a reckless, oppressive, or wanton manner, exemplary damages may be awarded: *Pearson v. Zehr*, 138 Ill. 48; 32 Am. St. Rep. 113. The same principle applies whether a corporation be a party plaintiff or defendant: *St. Peter's Church v. Beach*, 26 Conn. 355; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455; 29 Am. Rep. 43. A foreign corporation, by its agent, in the state of Illinois, sold a sewing machine in that state to be paid for in monthly installments. A lease was delivered and accepted, authorizing the seller, without process, to enter the premises of the purchaser and take the machine for nonpayment of any installment. The purchaser made certain payments to the same agent. Afterward, other agents of the seller entered his house, in his absence, and forcibly and violently, and against the remonstrance of his wife, removed the machine and kept it one day, when they returned it. The taking was claimed to be done under the belief that an installment was overdue and unpaid, but the first agent had been notified that it was paid. The case was held to be a proper one for exemplary damages: *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455; 29 Am. Rep. 43.

Corporations may be sued in trespass for the authorized acts of their servants, and exemplary damages recovered, when the circumstances of the violence and outrage are such as would authorize such damages against an individual: *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9; 72 Am. Dec. 287; *Denver etc. Ry. v. Harris*, 122 U. S. 597; *Anderson etc. R. R. Co. v. Kernodle*, 54 Ind. 314. Compare *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 660; 74 Am. Dec. 785, and monographic note to *Merrills v. Tariff Mfg. Co.*, 27 Am. Dec. 685, 688, on aggravation of damages to property, showing that a corporation may be held liable for vindictive damages for wrongs committed by their agents, with their authority or subsequent approval; and that bad motives, malice, etc., may be proved against a corporation as well as against an individual. "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civilliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is, that a corporation is liable *civilliter* for torts committed by its servants or agents precisely as a natural person; and that it is liable as a nat-

ral person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizing the act": *State v. Morris etc. R. R. Co.*, 23 N. J. L. 360, 367, 368. Hence, punitive damages within the sum claimed in the declaration may be awarded by the jury in an action of trespass on the case against a corporation to recover damages for injuries inflicted by its servants in a forcible and violent seizure of a railroad, where they are satisfied that the officers and servants of the defendant corporation employed the force complained of in the illegal assault with bad intent, and in pursuance of an unlawful purpose: *Denver etc. Ry. v. Harris*, 122 U. S. 597. "The doctrine of punitive damages should certainly apply in a case like this, where a corporation, by its controlling officers, wantonly disturbed the peace of the community, and by the use of violent means endangered the lives of citizens in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country": *Denver etc. Ry. v. Harris*, 122 U. S. 597, 610, per Mr. Justice Harlan. Although a sense of wrong or insult may not constitute a legal basis for exemplary damages, in an action by one corporation against another for a malicious and oppressive trespass committed upon its property, yet, when the result of such trespass is to impair the credit of the corporation plaintiff, and subject it to the expense of litigation, for these injuries it is entitled to claim such damage: *International etc. R. R. Co. v. Telephone etc. Co.*, 69 Tex. 277; 5 Am. St. Rep. 45. Exemplary damages may be allowed, in the federal courts, against a corporation, for a trespass upon the plaintiff's common-law right in an unpublished poem by unlawfully publishing it, and this, although no actual damages have been proved: *Press Pub. Co. v. Monroe*, 38 U. S. App. 410.

Trover and Conversion. —A corporation is liable in trover: *State v. Morris etc. R. R. Co.*, 23 N. J. L. 360, 367; and exemplary damages are recoverable against a corporation, in proper cases, for the tort known as conversion. If the act constituting a conversion by a corporation has been attended by circumstances of fraud, malice, or wanton disregard of the rights of the plaintiff he may recover such damages: *San Antonio etc. Ry. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 489; *Casey v. Ballou Banking Co.*, Iowa, May, 1896; otherwise, he cannot; *Abbott v. 76 Land etc. Co.*, 103 Cal. 607.

Carriers. —The principles respecting the recovery of exemplary damages against railway corporations, above discussed, apply to other carriers engaged in the business of transportation, such as steamboat and ferry companies, stage carriers, express companies, etc. For cases showing liability, see *Memphis etc. Packet Co. v. Nagel*, 97 Ky. 9; *Southern etc. Co. v. Brown*, 67 Miss. 260; 19 Am. St. Rep. 306; *Allen v. Camden etc. Ferry Co.*, 46 N. J. L. 198; *Hawkins v. Riley*, 17 B. Mon. 101; *Springer Transp. Co. v. Smith*, 16 Lea, 498; *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588. For cases showing when no recovery can be had, see *Mace v. Reed*, 89 Wis. 440; *The Normannia*, 62 Fed. Rep. 469. But we desist from a considera-

tion of these cases as they do not show whether the companies were incorporated or not, although the principles would be the same if they were incorporated.

Master and Servant.—In many states, it is held that when the act of an agent or servant is willful, malicious, grossly negligent, etc., but still within the scope of his authority, the superior will be liable in exemplary damages (or in those states where such damages are not allowed, the willfulness or wantonness of the act will enhance the damages), the same as if he had committed the act himself, and although the act was not otherwise authorized than by the general authority of the agent or servant, and was not subsequently ratified: See monographic note to Hagan v. Providence etc. R. R. Co., 62 Am. Dec. 381, on the liability of the principal or master, in exemplary damages, for the act of the agent or servant. This principle has been applied as we have shown above, in cases where a corporation stands in the place of master or principal: See, also, Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 42. Thus, a principal, whether a corporation or an individual, may be held liable in exemplary damages to a third person on account of a wrongful, wanton, and malicious act of his agent, done within the scope of his agency, although such act is not previously authorized or subsequently ratified by the principal: Rucker v. Smoke, 37 S. C. 377; 34 Am. St. Rep. 758.

There are other authorities holding that the principal or master is never liable in exemplary damages unless he has previously authorized the tortious act of his agent or servant, or subsequently ratified it. This principle too, as above shown, has been applied in cases where a corporation stands in the place of principal or master: See note to Hagan v. Providence etc. R. R. Co., 62 Am. Dec. 383; Sullivan v. Oregon etc. Nav. Co., 12 Or. 392; 53 Am. Rep. 364; International etc. R. R. Co. v. Garcia, 70 Tex. 207; Craker v. Chicago etc. Ry. Co., 36 Wis. 657; 17 Am. Rep. 504. The rule, however, holding the corporation answerable is supported by a great preponderance of authority as indicated by the cases above cited in this note, and in the note to Spellman v. Richmond etc. R. R. Co., 28 Am. St. Rep. 876, 877.

Municipal Corporations.—Exemplary or punitive damages cannot be recovered against a municipal corporation independently of express statutory provisions: Bennett v. Marion, Iowa, May, 1877; Wallace v. New York, 2 Illt. 440; Parsons v. Lindsay, 26 Kan. 426; Chicago v. Martin, 49 Ill. 241; 95 Am. Dec. 590; Wilson v. Wheeling, 19 W. Va. 323; 42 Am. Rep. 780; Adams v. Salina, Kansas, May, 1897; McGray v. Lafayette, 12 Rob. 674; 43 Am. Dec. 239.

Railroads.—There are many authorities which declare that a railroad corporation can in no event be liable in exemplary damages for the malicious, fraudulent, reckless, or oppressive acts of its servants or agents, unless such acts were previously authorized or subsequently ratified by the corporation, or it retains the agent in its employment after knowledge of his bad conduct, or has not exercised proper care in choosing him or in retaining him in its service: See monographic note to Spellman v. Richmond etc. R. R. Co., 28 Am. St. Rep.

876, on exemplary or punitive damages; *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 101; *Hagan v. Providence etc. R. R. Co.*, 3 R. L. 88; 62 Am. Dec. 877; *Norfolk etc. R. R. Co. v. Neely*, 91 Va. 539; *Downey v. Chesapeake etc. Ry. Co.*, 28 W. Va. 732; *Ricketts v. Chesapeake etc. Ry. Co.*, 33 W. Va. 433; 25 Am. St. Rep. 901.

But the decided weight of authority is to the effect that exemplary or punitive damages may be awarded against a railroad corporation for the wrongful acts of its servants or agents; and the rule is, that if the act of the agent or servant of a railroad corporation is so far within the line of his duty that his principal is answerable therefor, he is regarded as representing the corporation in the motives from which he acts and in the manner of his action, and the corporation is therefore answerable in exemplary damages if the act of the servant was malicious, reckless, or oppressive, and in every other instance in which the principal would have been answerable in such damages had it previously authorized or subsequently ratified the wrong done by its servant or agent: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858, and note thereto discussing the subject; *Alabama etc. R. R. Co. v. Sellers*, 93 Ala. 9; 30 Am. St. Rep. 17; *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28; *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144; 30 Am. St. Rep. 4; *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 28 Am. St. Rep. 883; *Louisville etc. Ry. Co. v. Wolfe*, 128 Ind. 347; 25 Am. St. Rep. 436; *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600; *Pittsburgh etc. Ry. Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517; *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365; 82 Am. Dec. 520; *Bass v. Chicago etc. Ry. Co.*, 36 Wis. 450; 17 Am. Rep. 495; *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 105; *Purcell v. Richmond etc. R. R. Co.*, 108 N. C. 414; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; *Chicago etc. Ry. Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782. Exemplary damages may be assessed against a railway corporation, in Indiana, when malice and oppression weigh in the controversy, and the offense is not punishable by the criminal law: *Louisville etc. Ry. Co. v. Wolfe*, 128 Ind. 347; 25 Am. St. Rep. 436.

If a passenger has been unlawfully ejected from a railway car in an insulting manner, or with circumstances of unnecessary violence or wantonness, indicating malice on the part of the servant representing the carrier, or a reckless disregard of consequences and of the rights and feelings of the person ejected, the corporation is answerable in exemplary or punitive damages: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858, and cases cited in note thereto; *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365; 82 Am. Dec. 520; *Western etc. R. R. Co. v. Ledbetter*, 99 Ga. 318; *Georgia etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499; *Louisville etc. Ry. Co. v. Goben*, 15 Ind. App. 123; *Callaway v. Mellett*, 15 Ind. App. 366; 57 Am. St. Rep. 238; *Quigley v. Central Pac. R. R. Co.*, 11 Nev. 350; 21 Am. Rep. 757; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; *Ellsworth v. Chicago etc. Ry. Co.*, 95 Iowa, 98, 107; *Lucas v. Michigan Cent. R. R. Co.*, 98 Mich. 1; 39 Am. St. Rep. 517; *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep.

157; note to Richmond etc. R. R. Co. v. Jefferson, 32 Am. St. Rep. 99; Georgia etc. Co. v. Eskew, 86 Ga. 641; 22 Am. St. Rep. 490; Southern etc. Ry. Co. v. Rice, 38 Kan. 398; 5 Am. St. Rep. 766; Chicago etc. R. R. Co. v. Flagg, 43 Ill. 364; 92 Am. Dec. 133; Philadelphia etc. R. R. Co. v. Larkin, 47 Md. 155; 28 Am. Rep. 442, and cases cited in note thereto; Palmer v. Railroad, 3 S. C. 580; 16 Am. Rep. 750; Coleman v. New York etc. R. R. Co., 106 Mass. 160; McKinley v. Chicago etc. R. R. Co., 44 Iowa, 314; 24 Am. Rep. 748; Fell v. Northern Pac. R. R. Co., 44 Fed. Rep. 248; Chicago etc. R. R. Co. v. Bryan, 90 Ill. 126; Galena v. Hot Springs R. R., 4 McCrary, 371; New Orleans etc. R. R. Co. v. Burke, 53 Miss. 200; 24 Am. Rep. 689. A railway corporation is answerable for the malicious and criminal acts of its employes toward passengers while they are executing what they suppose to be the orders of the company, even though the orders do not, in fact, contemplate such acts: McKinley v. Chicago etc. R. R. Co., 44 Iowa, 314; 24 Am. Rep. 748. Good faith does not excuse a wanton and malicious act. Thus, a genuine silver coin of the United States, though somewhat rare and of different appearance from other coins of the same government, of the same denomination of later dates, is, nevertheless, a legal tender for carfare, and a passenger ejected for refusing to make payment otherwise than by tendering such coin is entitled to damages. The fact that the conductor refused to receive the coin because he, in good faith, believed it was a counterfeit, does not relieve the railroad company from liability, especially where the conductor used insulting language in ejecting the passenger, and was very impolite and gruff, for the court is not unwarranted, in such a case, in charging the jury upon the law of vindictive damages: Atlanta etc. Ry. Co. v. Kenny, 99 Ga. 268.

If, however, an employe of a railway corporation, in enforcing a valid rule of the company, in a case to which he in good faith believes it to apply, without malice, rudeness, unnecessary force, violence, gross negligence, wantonness, indignity, or insult, ejects a passenger from a train, exemplary or punitive damages are not recoverable therefor: Fitzgerald v. Chicago etc. R. R. Co., 50 Iowa, 79; Paine v. Chicago etc. R. R. Co., 45 Iowa, 569; Allen v. Wilmington etc. R. R. Co., 119 N. C. 710; Hamilton v. Third Avenue R. R. Co., 53 N. Y. 25; Atchison etc. R. R. Co. v. Hogue, 50 Kan. 40; Patry v. Chicago etc. R. R. Co., 77 Wis. 218; Philadelphia etc. R. R. Co. v. Hoeflich, 62 Md. 300; 50 Am. Rep. 223; Louisville etc. R. R. Co. v. Guinan, 11 Lea, 98; 47 Am. Rep. 279; Cincinnati etc. R. R. Co. v. Cole, 29 Ohio St. 126; 23 Am. Rep. 729; Townsend v. New York etc. R. R. Co., 56 N. Y. 295; 15 Am. Rep. 419; Brown v. Missouri etc. Ry., 64 Mo. 536; Missouri Pac. Ry. Co. v. Shuford, 72 Tex. 165; Holmes v. Carolina Cent. R. R. Co., 94 N. C. 318; Alabama etc. Ry. Co. v. Purnell, 69 Miss. 652. If the defendant has only done what he honestly believed to be his duty, exemplary damages are not allowed in a case where there has been no intentional wrong committed, although the act may be unlawful, as where a railway passenger has paid his fare once but is put off because he does not pay it again, the conductor believing that it has not been paid. Compensatory damages are, however, allowable in such a case: Hamilton v. Third Avenue R. R. Co., 53 N. Y. 25.

Some cases hold that a railroad corporation cannot be held answerable in exemplary or punitive damages for the wanton or malicious acts of its conductor in wrongfully ejecting a passenger, unless it either authorized or ratified the malicious acts: *Warner v. Southern Pac. Co.*, 113 Cal. 105; 54 Am. St. Rep. 327; *Pittsburgh etc. Ry. Co., v. Russ*, 18 U. S. App. 279; *Bass v. Chicago etc. Ry. Co.*, 42 Wis. 654; 24 Am. Rep. 437; *Milwaukee etc. R. R. Co. v. Finney*, 10 Wis. 388; *Norfolk etc. R. R. Co. v. Neely*, 91 Va. 539. This class of cases holds a master answerable to the extent of compensatory damages for the unlawful act of his agent committed in the course of his employment, whether ratified or not; but in an action to recover exemplary or punitive damages of the master, for the tortious act of the servant, ratification of the master must be shown.

It has been held that exemplary damages can never be allowed, in the case of an unlawful expulsion from the cars of a railway corporation, in the absence of actual damages: *Kuhn v. Chicago etc. R. R. Co.*, 74 Iowa, 137; but compensatory damages, at least, are allowable for the indignity done by the mere fact of expulsion: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y. 25. The doctrine of contributory negligence does not apply to an action for damages for injuries occasioned by being forcibly ejected from a railway train: *Louisville etc. Ry. Co. v. Göben*, 15 Ind. App. 123.

Exemplary damages against a railway corporation are in the discretion of the jury in cases of personal wrong, and should not be awarded merely for a disregard of public duty, unless the circumstances of the case appear to the jury to justify or require such damages. When the neglect is unattended with circumstances of insult, injury, or suffering caused to plaintiff, vindictive damages should not be allowed. The existence and weight of such circumstances must be determined by the jury, if there is any evidence tending to show them: *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; 90 Am. Dec. 332. The corporation is not answerable in exemplary or punitive damages for injuries occasioned by one of its agents to one in getting off of a train, unless the act of such agent was wanton or malicious: *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 27; 21 Am. Rep. 371; nor for a failure to stop a train when signaled: *Wilson v. New Orleans etc. R. R. Co.*, 63 Miss. 352. When it employs competent agents, the corporation, in case of an injury to a passenger happening by reason of the mere failure of an agent to perform his duty, is not ordinarily answerable for punitive damages: *Ackerson v. Erie Ry. Co.*, 82 N. J. L. 254. The general rule, in an action against a railway corporation, to recover damages on account of personal injuries, alleged to have been caused by negligence on the part of the defendant, is, that exemplary, punitive, or vindictive damages are not recoverable for any want of care less than gross negligence: *Patterson v. South etc. R. R. Co.*, 89 Ala. 318. Compare subdivision, Negligence, *supra*. The mere fact that an act may have been wrongful and injurious is not enough to justify exemplary damages against a railway corporation, in the absence of actual malice or wanton indifference as to the rights invaded: *Hoffman v. Northern*

Pac. R. R. Co., 45 Minn. 53. This rule has been applied to a case in which an agent refused to sell a sleeping-car berth to a passenger on the ground that the latter had not a first-class ticket, whether such person acted as the agent of the railroad company or as the agent of the sleeping-car company: **Lemon v. Pullman Palace Car Co., 52 Fed. Rep. 262.**

If the conductor or employes on a railroad train act maliciously and wantonly in using insulting or abusive language to a passenger, or use force and violence in striking and injuring him, or unnecessary force in ejecting him from the cars, whether rightfully or wrongfully, the company is generally held answerable in exemplary or punitive damages for the injury received in consequence of such assault by the servant, even though it was voluntarily done, because the servant acts in relation to these matters in the prosecution and within the scope of his business and employment: **Note to Richmond etc. R. R. Co. v. Jefferson, 82 Am. St. Rep. 99; Alabama etc. R. R. Co. v. Frazier, 93 Ala. 45; 80 Am. St. Rep. 28; Chicago etc. R. R. Co. v. Bryan, 90 Ill. 126, 132; Hanson v. European etc. Ry. Co., 62 Me. 84; 16 Am. Rep. 404. Contra, Lake Shore etc. Ry. Co. v. Prentice, 147 U. S. 101. Compare, subdivision, "Assault and Battery," supra.**

If a railway corporation refuses to transport persons or goods through any ill-will or willful disregard of the rights of another, the jury may, in an action for such wrong, give exemplary damages: **Avinger v. South Carolina Ry. Co., 29 S. C. 265; 18 Am. St. Rep. 716; Illinois Cent. R. R. Co. v. Johnson, 67 Ill. 812; Hansley v. Jamesville etc. R. R. Co., 115 N. C. 602; 44 Am. St. Rep. 474; Purcell v. Richmond etc. R. R. Co., 108 N. C. 414.**

A railroad corporation is liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employes in the conduct of a train, if such violation of duty is accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of consequences: **Louisville etc. R. R. Co. v. Ballard, 85 Ky. 307; 7 Am. St. Rep. 600.** Exemplary damages will not be allowed for a failure to stop a train at a station, and give a passenger opportunity to alight therefrom, unless the failure to stop was willful, or the wrong was aggravated in some manner by the railroad company or its employes, in which case such damages may be allowed: **Dorrah v. Illinois Cent. R. R. Co., 65 Miss. 14; 7 Am. St. Rep. 629.** Vindictive damages were held to be authorized, in this class of cases, in **Alabama etc. R. R. Co. v. Sellers, 93 Ala. 9; 80 Am. St. Rep. 17; Samuels v. Richmond etc. R. R. Co., 85 S. C. 493; 28 Am. St. Rep. 883; but not to be authorized in Carter v. Illinois Cent. Ry. Co., Kentucky, March, 1896; Mississippi etc. R. R. Co. v. Gill, 66 Miss. 39; Kansas City etc. R. R. Co. v. Fite, 67 Miss. 373; Thompson v. New Orleans etc. R. R. Co., 50 Miss. 315; 19 Am. Rep. 12; Chicago R. R. Co. v. Scurr, 59 Miss. 456; 42 Am. Rep. 373. Compare Southern R. R. Co. v. Kendrick, 40 Miss. 374; 90 Am. Dec. 832.**

A railroad company may be held answerable in exemplary damages for running its train past a station, without giving time enough for a passenger to get aboard, whereby he is deceived and injured;

but punitive damages will not be allowed in the absence of circumstances of malice, oppression, insult, personal injury, damage to business, or mental or physical suffering: *Memphis etc. R. R. Co. v. Green*, 52 Miss. 779.

A railroad company, in the absence of any evidence showing malice, wantonness, oppression, fraud, etc., is not answerable in exemplary damages, for the detention and loss of baggage: *Norfolk etc. R. R. Co. v. Lipscomb*, 90 Va. 137; or, in replevin, for the wrongful detention of property, such as machinery: *Illinois Cent. R. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663.

In cases where livestock are run over and killed by a locomotive on a railroad track, exemplary damages are not recoverable against the corporation, unless there is shown some evil motive on the part of the defendant or its agents, as indicated by reckless indifference to the rights of the plaintiff, or other wanton or willful neglect or duty causing the mischief, in which case such damages may be recovered: *Talbott v. West Virginia etc. Ry. Co.*, 42 W. Va. 560; *Chicago etc. R. R. Co. v. Jarrett*, 59 Miss. 470; *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156; 66 Am. Dec. 552.

With respect to instructions, it may be said that when the cause of action against a railway corporation to recover exemplary damages for ejecting plaintiff from a train, or for any other wrong done to him by the company, is properly pleaded, and is supported by the evidence, the issue of exemplary damages should be submitted to the jury, under instructions that the plaintiff is entitled to recover such damages for a willful and malicious invasion of his rights by the servants or employes of the company: *Spellman v. Richmond etc. R. R. Co.*, 85 S. C. 475; 28 Am. St. Rep. 858; and an instruction to a jury, in an action against a railroad corporation, that if they find from the evidence that vindictive damages should be given, they have the right to give such damages as the evidence authorizes, not beyond the amount claimed in the complaint, is a correct statement of the rule for the guidance of juries in the assessment of punitive damages: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 80 Am. St. Rep. 28.

While a railroad corporation is answerable for the willful misconduct of its employé, if he, while acting within the range of his employment does an act injurious to another, either through negligence, wantonness, or intention, there is no such liability where he goes beyond the range of his employment, and of his own will does an unlawful act injurious to another: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 80 Am. St. Rep. 28; *Illinois Cent. R. R. Co. v. Latham*, 72 Miss. 32; *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 1656; 49 Am. St. Rep. 436. Thus, a railroad corporation is not answerable in exemplary or punitive damages for an unjustifiable arrest, or for an illegal, wanton, and oppressive arrest of a passenger, made by one of its servants or employes, and which it does not authorize or ratify, as such an act is not considered within the scope of their employment: *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 101; note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 101, and cases there cited. A railroad company may be held in exem-

plary damages for gross negligence in failing to provide suitable fences and guards of its road, without depriving it of due process of law: *Missouri Pac. Ry. Co. v. Humea*, 115 U. S. 512; *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 28. We cannot close this subdivision without observing that, in all actions against railway corporations for damages for injuries, the manner of the act occasioning the injury, as well as the authority to do it, are both to be considered; and the main contention is over these two questions, for there is not much difficulty in determining the liability when a conclusion is reached as to them. In this connection the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-83, on acts of servant for which master is not answerable, may be consulted with profit.

Street Railway Companies.—Exemplary or punitive damages are not recoverable against a street railway corporation where there is no evidence of malice, ill-will, or wanton conduct toward the plaintiff involved in the injury; *Pleasants v. North Beach etc. R. R. Co.*, 34 Cal. 586; *Turner v. North Beach etc. R. R. Co.*, 34 Cal. 594; *Biloxi R. R. Co. v. Maloney*, 74 Miss. 738; *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144. Neither is it liable in such damages for the wanton and willful trespass of a conductor, not in the performance of any duty to, or of any act authorized by, the company: *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122; 7 Am. Rep. 418; or for any other act of one of its agents beyond his authority or scope of employment: *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 1656; 49 Am. St. Rep. 436. That exemplary damages can be recovered of a street-car company for the wrongful and malicious act of its agent only when such act is either authorized or ratified by the principal, see *Robinson v. Superior Rapid Transit Co.*, 94 Wis. 345; post, p. 897; *Turner v. North Beach etc. R. R. Co.*, 34 Cal. 594. A street railway company is, however, answerable in exemplary or punitive damages for an injury occasioned to a passenger through the gross negligence of one of its employes: *Central etc. Ry. Co. v. Chatterson*, Kentucky, Jan., 1895; or where a wrongful act is accompanied by insulting language and "very impolite and gruff" conduct: *Atlanta etc. Ry. Co. v. Keeny*, 99 Ga. 266.

Sleeping-car Companies may be held liable in exemplary damages in cases of wanton injury; but there is no fixed standard for measuring damages in actions for torts. Each case must depend largely on its own facts: *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 810.

Telegraph Companies.—Exemplary damages may be recovered against a telegraph company for failure to transmit and deliver a message, where there is such gross negligence on the part of the agents of the company as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message: *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530. So, if the employes of a telegraph company negligently allow its wires to fall on the wires of an electric light company, and to remain there hanging down, the telegraph company is answerable in exemplary damages to one injured by accidentally coming into contact with the wires, if the employes acted in a spirit of mischief or criminal indifference,

and it was known to the company's managers, or if the managers did not exercise proper care in selecting the employes, or if they knew, or had means of knowing, that they were not skillful, prudent, or careful: *Henning v. Western Union Tel. Co.*, 41 Fed. Rep. 864. If the agent of a telegraph company, receiving a reply message for transmission, knows the urgent necessity for promptness in forwarding it, but delays to send it off until the next morning, it is a question for the jury to decide whether this was not such gross negligence as evinced an utter disregard of the plaintiff's feelings and rights; and, if they so determine, punitive damages may be awarded: *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314.

On the other hand, a telegraph company cannot be held answerable in exemplary damages for an injury occasioned by its servants or employes in the absence of willful or malicious conduct, or intentional wrong: *Western Union Tel. Co. v. Eysler*, 91 U. S. 495, note reversing 2 Colo. 141; *Erie Tel. Co. v. Kennedy*, 80 Tex. 71. A telegraph company is not answerable in exemplary damages, on account of the mere failure of its agents to find the addressee of a telegram, where it is not shown that the company had knowledge of the incompetency of its agents when they were employed, or that they were retained after it was known: *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60.

SUPREME LODGE OF KNIGHTS OF PYTHIAS OF THE WORLD v. ESKHOLME.

[799 NEW JERSEY LAW, 255.]

INSURANCE—MUTUAL BENEFIT SOCIETIES—EFFECT OF ILLEGAL EXPULSION.—A vote, in a mutual benefit society, such as the Knights of Pythias, to suspend a member indefinitely is, in effect, a vote to expel, and no jurisdiction is acquired, in either case, without proper notice of the appointment of a committee of trial, and where the proceedings have been otherwise irregular. Hence, he may recover upon a certificate of insurance issued to him by the lodge, where he has not been convicted in accordance with the rules of the society, nor under general principles of law, as his membership still continues.

INSURANCE—MUTUAL BENEFIT SOCIETIES—APPEAL. WANT OF JURISDICTION does away with the obligation to seek relief by appeal even when required by the constitution of a mutual benefit association, such as a lodge of the Knights of Pythias, in otherwise proper cases. The duty of an expelled member to exhaust by appeal, or otherwise, all the remedies within the organization arises only where the association is acting strictly within the scope of its powers.

J. Franklin Fort, for the plaintiff in error.

Riker & Riker, for the defendants in error.

255 BARKALOW, J. The defendants in error in this case brought a suit against the plaintiff in error, in the Essex circuit

court, upon a certificate of insurance in the Endowment Rank of Knights of Pythias of the World, issued to Samuel Granger.

The defense pleaded was that Samuel Granger had been suspended indefinitely from the subordinate lodge of which he was a member, and that the insurance was thereby forfeited.

The case was tried by a circuit judge, without a jury, upon an agreed state of facts, together with certain testimony taken in another suit, which was made evidence in this case by agreement. Judgment was rendered for the plaintiffs by the trial judge upon his findings of facts, and upon a writ of error to the supreme court that judgment was approved and is now brought here for review. These findings, unless unsupported by evidence, must be accepted by us as the facts in the case.

²⁵⁶ We do not find any error in this particular except as to the conclusion that the committee of investigation was appointed by the lodge and not by the chancellor and vice-chancellor; but that conclusion seems to be without warrant in the testimony, so that we feel constrained to omit that alleged circumstance from consideration. All that appears with regard to it is as follows: "It is agreed that on November 1, 1887, the said charge was received by the lodge and a committee was appointed to investigate the same, and that the minutes of the lodge on this subject are as follows: 'Nov. 1, 1887. Moved that the charge of Bro. M. S. Crane be received and committee be appointed. The same were as follows,' " and here the names are given. It is not stated by whom they were appointed.

The facts in this case were largely the subject of agreement and appear in writing in the "agreed facts," and the pertinent sections of the constitution of the order also form a part of the case.

It is unnecessary here to comment upon those particulars of this agreement which are not in controversy, or to reprint the documents referred to which appeared in the case.

The following requirements of the established mode of procedure of this organization are the ones to be noted:

1. Constitution of La Mancha Lodge, article 10, section 1: "Charges or complaints made against members of the lodge under the penal provisions of the laws, rules, and regulations shall be reduced to writing and distinctly state the cause, on or about the time and place of occurrence; said charges or complaints to be presented to the lodge at a regular session thereof, read, received, and laid over to the next meeting of the lodge."

It appears that on October 25, 1887, charges were preferred in writing against Samuel Granger, "read" and "laid over," and

that on November 1, 1887, one week after, "the said charge was" "received" "by the lodge and a committee was appointed to investigate the same." Such is the phraseology of the minutes.

²⁵⁷ The article and section of the constitution already referred to further provide for service upon the accused of a copy of the charges and also a "notice that the matter will be taken up at the next session of the lodge [giving day and date], when a committee of five members in good standing shall be appointed." No notice of the intended appointment of this committee appears to have been served upon Samuel Granger. The only notice which appears is one of November 9, 1887, commanding Granger to appear before the committee of trial on November 21st, then and there to answer to the charges and specifications preferred, no mention of the intended appointment of a committee being made. This is the first error appearing in the proceedings which were necessary to give jurisdiction.

2. The second section of article 10 of the constitution of this body provides that, after having received all the evidence and proofs presented, a written report of the findings as to the guilt or innocence (of the accused), together with the recommendations of the committee in the case, the journal of their proceedings and the testimony received, shall be presented to the lodge at the second meeting thereafter.

On November 29, 1887, being apparently the second regular meeting of the lodge after November 21st, it appears that a report of the trial committee was read and a minority report was laid on the table; then that a motion was made that the report of the committee on trial be again read, and carried; that a motion was made that Granger be suspended indefinitely from the lodge, and finally a motion was made to notify Granger to appear before the lodge "on December 12, 1887, when action would be taken on his case." The minutes of this meeting are obscure, but they seem intended to indicate that the first two motions were carried.

The motion to suspend Granger does not seem to have been put to a vote, and the same would be true of the motion to notify him that action would be taken on the 12th of December did not the letter mailed to him imply that it was passed.

It does not appear in evidence that the report of the trial ²⁵⁸ committee was accompanied by a recommendation, or by the journal of their proceedings, or by the testimony received. So far as appears in the case, the motion to suspend was made without reference to any recommendation of the committee, and was

postponed without action. This is the second error appearing in the proceedings.

3. It is to be observed that the notice to Granger to appear and "hear the report of the committee of trial" and "what other business pertaining to this case might come before the lodge" was given for the 12th of December. It is admitted that there was no meeting of the lodge, regular or special, held on that day, and this misleading notice constitutes, on general principles, a third error in procedure.

4. The third section of article 10 of that constitution provides that upon consideration of such a report "a vote shall be then taken, the question being: 1. 'Shall the lodge adopt the findings of the committee as to the guilt or innocence of the accused?' which shall be decided by a majority vote; 2. 'Shall the recommendation of the committee stand as the judgment of the lodge?'"

On December 13th, the day after Granger was notified to appear to hear the report, the report was taken from the table and no action taken upon it, so far as the minutes show, neither was any reference made to any recommendation of the committee, but a motion was made, and carried by a two-thirds vote, that Granger be suspended indefinitely.

Here, it will be seen, was no such vote as the constitution requires; the separate questions were not put as directed and a simple motion to suspend was made and passed; and this constitutes a further irregularity.

In *Vivar v. Knights of Pythias*, 52 N. J. L. 455, it was held that a vote to suspend for ninety-nine years was, in effect, to expel, and the same is true of a vote to suspend indefinitely. And it was also held in that case that "an attempt at expulsion, without conviction had in accordance with the rules of the society or under the general principles of law, is nugatory. The membership of the individual continues."

²⁵⁹ In this case it will be seen that jurisdiction was not acquired by proper notice of the appointment of a committee of trial, and that the proceedings were in other respects irregular and not such as to justify or sustain a judgment.

The want of jurisdiction does away with the obligation to seek relief by appeal, even when required by the constitution of a lodge, in otherwise proper cases.

"The obligation to appeal is not imposed when the judgment is void for want of jurisdiction. . . . The duty of an expelled member to exhaust by appeal or otherwise all the remedies within

the organization arises only where the association is acting strictly within the scope of its powers": Bacon on Benefit Societies, sec. 107.

The judgment rendered by the circuit court and approved by the supreme court should be affirmed.

INSURANCE—MUTUAL BENEFIT SOCIETIES—EFFECT OF ILLEGAL SUSPENSION OR EXPULSION.—The suspension or expulsion of a member of a benefit association without notice, or a hearing or trial, is void and no bar to a suit by the beneficiary to recover the insurance money: See monographic note to *Lake v. Minnesota etc. Relief Assn.*, 52 Am. St. Rep. 576, 577, on features of the law specially applicable to mutual or membership life or accident insurance.

DECISIONS OF SPECIAL TRIBUNALS of social and other organizations: See note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 193.

DANECK v. PENNSYLVANIA RAILROAD COMPANY.

[59-NEW JERSEY LAW, 415.]

HIGHWAYS—DANGEROUS EXCAVATIONS—PROXIMITY—LIABILITY FOR INJURIES.—One who digs an excavation near a highway, and leaves it unguarded, is not answerable in damages to a person who departs from the highway and is injured by falling into such excavation, unless it is so near the highway as to endanger those who use the way with reasonable care. Hence, if one, ignorant of the locality, wanders in the dark at night, from a public highway, over an unused strip of land, fifteen feet in width, belonging to a third person, into the land of a railroad company, and, after crossing five feet of it, falls, with his horse and buggy, into an unguarded railroad cut, made before the construction of the highway, and is injured, the railroad company is not liable therefor, as the cut, in such a case, does not substantially adjoin the highway, and is not dangerous to those who use it with care, where all the land crossed is a foot or more above the crown of the highway, and constitutes a barrier sufficient to excite caution after departing from the highway.

Action for damages. The plaintiff was driving at night, with a horse and buggy, toward the terminus of Louisa street, in North Elizabeth, New Jersey. There was a strip of land, about fifteen feet wide, between the terminus of the street and the defendant's right of way, belonging to a third person, and about five feet from the line of way there was a railroad cut, running at right angles to Louisa street, made before the highway was constructed. This made about twenty feet of land between the terminus of the street or highway and the cut. The depth of the cut was five feet or more below the crown of the highway, and the land between the terminus of the street and the cut was a low earth embankment, gradually rising from a point a foot above the crown of the street. The plaintiff drove over this intervening land and

plunged into the cut. The consequence was, that the horse was killed, the buggy broken, and the plaintiff injured. He brought suit against the railroad company for the damage thus occasioned, and the court directed the jury to find for the defendant.

Samuel Kalisch, for the plaintiff in error.

James B. Vredenburgh, for the defendant in error.

417 THE CHANCELLOR. The single question presented is whether there existed any liability upon the part of the defendant in error for the injury which the plaintiff sustained.

It is insisted in behalf of the plaintiff that it was the duty of the defendant to have fenced or otherwise to have suitably guarded the terminus of Louisa street against the railway cut, and that, because of its failure to do so, the plaintiff may maintain his action.

The doctrine invoked is, that an unguarded excavation upon land outside a public highway, but so near it as to endanger those who pass along the way in the exercise of ordinary caution, is a public nuisance from which may spring a right of action to one who suffers individual injury therefrom. The doctrine appears to be recognized by the weight of authority: *Barnes v. Ward*, 9 Com. B. 392; *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175; *McAlpin v. Powell*, 70 N. Y. 126, 133; 26 Am. Rep. 555; *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260, 264; *Vanderbeck v. Hendry*, 34 N. J. L. 467, 471; *Norwich v. Breed*, 30 Conn. 535; *Wood on Nuisances*, sec. 271; *Ray on Negligence of Imposed Duties*, 26; *Elliott on Roads and Streets*, 542, and the cases hereafter cited; although it seemingly has not the approval of the supreme court of Massachusetts: *Howland v. Vincent*, 10 Met. 371; 43 Am. Dec. 442; *McIntire v. Roberts*, 149 Mass. 450; 14 Am. St. Rep. 432. Our supreme court, in the case of *State v. Society etc.*, 42 N. J. L. 504, in its decision upon motion to quash the indictment, accepted the doctrine broadly as to excavations made after the construction of the highway, but in its decision in the same case, upon the rule to show cause why there should not be a new trial (*State v. Society etc.*, 44 N. J. L. 502), held that the doctrine was not applicable in the case of a highway dedicated after the making of the excavation, for in that case the dedication was accepted by the public, subject to the existing adjacent excavation, and the duty to protect it became a duty of the public and limited its decision to that point.

It is not necessary, in the disposition of the present case, that any opinion shall be expressed as to the tenability of the ⁴¹⁸ doctrine invoked. Assuming its correctness for the purpose of

disposing of this case, it is observed that an essential requisite to the defendant's liability and limitation of the doctrine is, that the unguarded excavation shall be so near the highway as to endanger those who use the way with reasonable care. What is meant by such proximity is well defined in the following quotation from the opinion in *Hardcastle v. South Yorkshire Ry. Co.*, 4 Hurl. & N. 67; 28 L. J. Ex. 139: "When an excavation is made adjoining a public way, so that a person walking on it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage, who might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different. We do not see where the liability is to stop. A man, going off a road on a dark night and losing his way, may wander to any extent, and if the question be for the jury, no one can tell whether he was liable for the consequences of his acts upon his own land or not. We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise, and if, in every case, it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous."

In that case the plaintiff's intestate at night walked along an ancient public footpath, running beside the by-wash of the defendant's canal, and coming to a turn in the path to a bridge over the by-wash, he, by mistake, continued straight on out of the path upon the defendant's land some twenty or thirty feet over a buttress and into a reservoir of the defendant, where he was drowned. It was held that the defendant was not liable in an action brought by the administratrix. The decision was put upon the principle of *Blythe v. Topham*, Cro. Jac. 158, 1 Bol. Abr. 88, where it was held that if A, ⁴¹⁹ seised of a waste adjacent to a highway, digs a pit in the waste, within thirty-six feet of the highway, and the mare of B escapes into the waste and falls into the pit and dies there, B shall not have an action against A, because the making of the pit in the waste, and not in the highway, was not any wrong to B, but that it was the default of B himself that his mare escaped into the waste.

In the case of *Hounsell v. Smyth*, 7 Com. B., N. S., 729, the allegation of the declaration was that an unguarded quarry was situate near to and between two public highways in a waste, and

that it was dangerous to persons who might accidentally deviate or stray from the highways or intentionally cross the waste from one to the other, and it was held, as the danger was not alleged to the persons passing along either highway, but to persons who might accidentally deviate or stray from or intentionally leave the ways, that no duty to guard the quarry appeared, and therefore that no liability for the injury complained of existed.

The case of *Binks v. South Yorkshire Ry. Co.*, 3 Best & S. 242, is perhaps as nearly like the case before us as any adjudication that can be found. There a canal was constructed beside an ancient footway, at a distance of about twenty-four feet from it, with a towing-path on the bank of the canal and an intermediate space between that and the footpath, which intermediate space, through laxity on the part of the defendant company, was generally walked over by the public and had become obliterated as a dividing line; yet it was held that the proximity of the canal to the footpath was not such as imposed upon the defendant company a duty to guard it or a liability for accident to one who strayed from the path.

The definition of proximity which is stated and illustrated in these cases is accepted, without exception, I think, by all the cases which have acquiesced in the doctrine invoked by the plaintiff in error.

It is deemed that the case considered is clearly within these adjudications. The railway cut was twenty feet or more from the street, and was separated therefrom not only by five or more feet of intervening land belonging to the defendant, but also by a strip of land fifteen feet wide, which belonged to some third person. All this land was above the crown of the street and presented enough barrier to progress toward the railway cut to plainly mark the departure from the highway and excite to caution. It is deemed that the cut did not substantially adjoin the highway, so that by false step or in surprise at the sudden termination of the highway the plaintiff could have been thrown into it, but, on the contrary, that the case made is one in which, in the dark at night, the defendant wandered from the highway over the land of the third person into the land of the defendant, and from thence into the railroad cut. We think that the defendant is not liable for the injury consequent upon the plaintiff's accident, and consider that the jury was properly instructed.

Let the judgment be affirmed.

HIGHWAYS—DANGEROUS EXCAVATIONS AT A DISTANCE.
An owner of land is under no obligation to strangers to put guards

around excavations made by him unless they are so near a highway as to be dangerous, under ordinary circumstances, to persons passing along the way, and using ordinary care to keep upon the proper path: Note to Moran v. Pullman Palace Car Co., 56 Am. St. Rep. 549; notes to Bedell v. Berkey, 15 Am. St. Rep. 374; McIntire v. Roberts, 14 Am. St. Rep. 435. As a general rule, in the absence of special circumstances, if a person traveling on a highway deviates therefrom and falls into a pit or excavation on the adjacent land, the owner of the land is not liable: Beck v. Carter, 68 N. Y. 283; 23 Am. Rep. 175. An owner of land making an excavation within a few feet of a public street is not liable for an injury caused by a person getting off the line of the street in the night-time and falling into it: Howland v. Vincent, 10 Met. 371; 43 Am. Dec. 442. A city is not liable where, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another: Note to Moran v. Pullman Palace Car Co., 56 Am. St. Rep. 549. As to liability for injuries occasioned from excavations made within a certain number of feet from the highway, see monographic note to Sparhawk v. Salem, 79 Am. Dec. 702-705. See, also, the note to Beck v. Carter, 23 Am. Rep. 183, 184.

CASE v. CENTRAL RAILROAD COMPANY.

[59 NEW JERSEY LAW, 471.]

NONSUIT FOR FAILURE OF PROOF—WHEN PROPER.—A nonsuit is not erroneous where the plaintiff fails to prove the cause of action alleged in his declaration, but proves a different cause of action, and no motion is made to change the declaration.

RAILROADS—KILLING OF STOCK—OWNER'S CONTRIBUTORY NEGLIGENCE.—Every man is bound, at his peril, to keep his stock on his own close, and to prevent them from going onto that of his neighbor. Hence, if one allows his horses to break out of their pasture lot, and to stray upon a railroad track, where they are killed by a locomotive, the owner's contributory negligence will bar a recovery for their loss, even if they were killed through the negligence of the company's servants.

Richard S. Kuhl, for the plaintiff in error.

George H. Large, for the defendant in error.

472 DIXON, J. The declaration in this case charged that "the defendant wilfully and wantonly drove its locomotive engine and cars" against several horses belonging to the plaintiff and killed them, and therefore the plaintiff claimed damages from the defendant. Upon the trial, the plaintiff proved that the horses had broken through the fence between his pasture lot and the highway, had strayed along the highway to the defendant's railroad, and there, while wandering upon the track several hundred feet from the highway crossing, had been killed. At the close of the plaintiff's evidence the trial justice ordered that a nonsuit be entered, and upon this judgment error is assigned.

In more than one aspect of the case, this judgment can be justified.

1. The testimony did not present the slightest indication that the defendant or its servants had willfully or wantonly driven the engine against the horses, nor does the plaintiff now contend that any fault, beyond a lack of ordinary care on the part of the engine driver, was shown. Manifestly, such proof did not establish the alleged cause of action, and, in the absence of an application to change the narratio, a nonsuit was not erroneous.

2. But if the declaration had charged that the horses were killed through the defendant's negligence, still the nonsuit would have been proper.

The horses were trespassing upon the defendant's track without any shadow of right, and the plaintiff did not attempt to prove that, for this trespass, the defendant was in fault under either the common law or any statute. The authorities are not entirely agreed whether, in such circumstances ⁴⁷³ the defendant owed to the plaintiff the duty of exercising ordinary care with respect to the horses, or only the duty of abstaining from willful injury. But if it be conceded that, *prima facie*, the defendant owed the larger duty of ordinary care, yet, as it appears that the animals came upon the track through the fault of the plaintiff, his claim against the defendant was legally defeated by his own contributory negligence, for, "according to the principles of the common law, . . . every man at his peril is bound to keep his cattle on his own close, and prevent them from going on to that of his neighbor": *Coxe v. Robbins*, 9 N. J. L. 384; *Chambers v. Matthews*, 18 N. J. L. 368. It was a natural and proximate consequence of the plaintiff's failure to discharge this duty that the horses should have strayed into the highway and thence upon the track, and there meet with injury from passing trains. Such a fault precluded recovery, even though the negligence of the defendant's servants helped to cause the accident: *Vandegrift v. Rediker*, 22 N. J. L. 185; 51 Am. Dec. 262; *Price v. New Jersey R. R. etc. Co.*, 31 N. J. L. 229.

3. But, lastly, the existence of negligence on the part of the defendant's servants was negatived by the testimony. The plaintiff called the engineer as a witness, and he swore that, when the animals were discovered upon the track, the alarm whistle was sounded, the engine was reversed, the Westinghouse brake was applied, and the train was stopped as soon as possible. Against this there was no contradictory evidence.

The judgment of nonsuit should be affirmed.

NONSUIT MAY BE GRANTED where there is no proof to support the issue: *Tison v. Yawn*, 15 Ga. 491; 60 Am. Dec. 708.

RAILROADS—KILLING OF STOCK—OWNER'S NEGLIGENCE. An owner of stock is bound, at his peril, to take care of them, and, if he suffers them to escape and they stray upon a railroad track, and are killed, the owner cannot recover damages therefor, unless the injury was gratuitously done: *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 49 Am. Dec. 239; *Vandegrift v. Rediker*, 22 N. J. L. 185; 51 Am. Dec. 262; *Railroad Co. v. Skinner*, 19 Pa. St. 298; 57 Am. Dec. 654; *Eames v. Salem etc. R. R. Co.*, 98 Mass. 560; 90 Am. Dec. 676, and note; *Maynard v. Boston etc. R. R.*, 115 Mass. 458; 15 Am. Rep. 119. Compare monographic notes to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 248-273; *Savannah etc. Ry. Co. v. Geiger*, 58 Am. Rep. 708-707, discussing liability for injuries to trespassing animals.

GENZ v. STATE.

[60 NEW JERSEY LAW, 486.]

CRIMINAL LAW—INSANITY AS A DEFENSE—HOMICIDE. Insanity is not available as a defense to an indictment for murder, if the accused, at the time of the killing, was capable of distinguishing between right and wrong, with respect to that act, and was conscious that the act was one which he ought not to have done, although he might have been impelled by an irresistible impulse to do it.

HOMICIDE—UNCONTROLLABLE IMPULSE.—An impulse to kill is not irresistible where it is not controlled so long as the weapon of death is directed against another, but instantly ceases when the slayer turns it against himself.

APPEAL—CRIMINAL LAW—EVIDENCE ILLEGALLY ADMITTED—REVERSAL OF JUDGMENT.—The admission of illegal testimony, in a criminal case, is no ground for reversal of judgment, where it plainly appears that it could not have injuriously affected the defendant on the merits of the case.

Gilbert Collins and William S. Stuhr, for the plaintiff in error.

Charles H. Winfield, prosecutor of the pleas, for the defendant in error.

GUMMERE, J. The plaintiff in error was indicted by the grand jury of the county of Hudson for the crime of murder, in willfully, deliberately, and premeditatedly killing one Clara Arnim, on Tuesday, the twenty-eighth day of August, 1894. Being tried upon that indictment, he was found guilty, by the verdict of a jury, of murder of the first degree. The judgment entered upon that verdict, and all the proceedings had upon the trial, have been removed, by writ of error, into this court, and it becomes our duty, under the supplement of May 9, 1894, to the "act regulating proceedings in criminal cases" (Gen. Stats., sec. 170, p. 1154), to review the whole of such proceedings in order that we may be satisfied that the plaintiff in error has not suffered

manifest wrong or injury either by the rejection of testimony, or in the charge made to the jury, or in the denial of any matter by the trial court which was a matter of discretion, or upon the evidence adduced upon the trial.

It was admitted at the trial that Clara Arnim, who was the mistress of the plaintiff in error, came to her death at his hands. His defense was that he was insane at the time when he committed the act, and the principal injury which it is alleged on his behalf that he suffered, at the trial, was the failure of the court to correctly charge the jury on the subject of insanity as a defense. The instruction of the court to the jury on this point was as follows, viz: That the defense of insanity is that the mind of the prisoner was so impaired and diseased that, at the time of the commission of the act of killing, he was not capable of distinguishing the nature and quality of the act done by him; that he was then incapable, by reason of mental disease or impairment of ⁴⁰⁰ his mind, to conceive the intent to kill the deceased; that at that time he was incapable of distinguishing between right and wrong with respect to that act; that if he was in this state of mind, in the eye of the law he was insane; that the burden of proof, in making out the defense of insanity, rests upon the prisoner; that he is presumed to be sane, and that when he sets up the defense of insanity he must make out such defense by sufficient proof—such proof as would satisfy the jury that he was mentally incapable of understanding the nature and quality of his act, or incapable of understanding whether his act of killing was right or wrong; that if the jury should find the prisoner was, by reason of any disease of the mind at the time of the commission of the act of killing, incapable of distinguishing between right and wrong in the doing of the act, it would be their duty to acquit him of any degree of murder.

It is insisted, on behalf of the plaintiff in error, that this instruction was not a correct exposition of the law of insanity as a defense in criminal cases, and that the court should have charged the jury that, if they believed from the evidence that the prisoner was mentally diseased, and, being in that condition of mind, was forced by an irresistible impulse to take the life of the deceased, it was their duty to acquit him.

Whether or not the true test of responsibility for criminal acts, in cases of alleged insanity, is the ability to distinguish right from wrong, has never been considered or determined in this court; but, ever since the charge of the court to the jury in the case of *State v. Spencer*, 21 N. J. L. 196, it has been accepted as the law of this state that if the accused, at the time of committing the

act, was capable of distinguishing between right and wrong, and was conscious that the act was one which he ought not to have done, he cannot be excused on the ground of insanity.

Since the promulgation of that decision more than fifty years ago, the test of responsibility in cases of alleged insanity there laid down has always been adopted by the criminal courts of our state in instructing juries upon this branch of ⁴⁹¹ the law. A rule so important, and which has been accepted so long and so universally, ought not now to be changed by judicial decision. As was said by Chief Justice Beasley in the case of *Graves v. State*, 45 N. J. L. 208, in commenting upon an attack made upon another rule laid down in the *Spencer* case: "If such a rule, after so conspicuous and protracted an existence, is to be pushed aside, or even is to be considered as liable to challenge on theoretic grounds, it is difficult to divine upon what stable basis the administration of the law is to be conducted. Very many of the legal regulations which belong to the trial of causes, criminal and civil, are the creatures of custom and usage, and, if such regulations, after having been unquestioned and enforced for half a century, are to be deemed, with respect to their legality, subject to assault, the utmost uncertainty and confusion would be introduced." The test of criminal responsibility in cases of alleged insanity, as stated by the trial court in its charge to the jury, was in accordance with the settled law of the state, and consequently the plaintiff in error suffered no injury therefrom.

But even if it had been the policy of our law to relieve insane persons from responsibility for criminal acts, the doing of which they knew to be wrong, provided they were impelled by irresistible impulse to do them, it is not perceived how such a principle would have had any relevancy in the case before us. A patient examination of the whole testimony has failed to disclose the existence of a single fact which affords any ground for concluding that the killing of Clara Arnim by the plaintiff in error was the result of an irresistible impulse on his part. And not only is this so, but the plaintiff in error himself, by his testimony given on the witness stand, negatives any such idea. It appears that, on the morning of the homicide, he bought the revolver with which he shot to death the woman who had been his mistress; that after purchasing the revolver, he went to a flower store and purchased a bouquet of flowers, which, the florist understood from him, was to be used at a funeral; that he then went to a barber ⁴⁹² shop to be shaved, and that as he sat in the chair he told the barber to hurry up, because he (the plaintiff in error) had only eight minutes to live; that he only had until two o'clock to live, and that

he intended to kill himself at that hour; that after being shaved he went to the house where his mistress resided, but that, before entering it, he stopped in an adjoining saloon and took a glass of ginger ale, and that, as he left the saloon, he bade the proprietor farewell, saying, "Good-by, you will never see me again; don't condemn me too hard." Within five minutes after leaving the saloon he had fired the shots which took the life of his mistress, and she was shortly afterward found lying dead upon the floor, holding in her hand the flowers which he had bought, and with his arms clasped around her.

The story told by him on the witness stand was that he did not know, and could not explain, why he had purchased the revolver, although he remembered that he had done so; that although he recollected being in the flower store, he did not know what was in his mind when he bought the bouquet; that he remembered slightly his being in the barber shop, but that he had no recollection of going to the house of his mistress or of shooting her; that his first recollection of being in her house or of seeing her was when she was lying bleeding and dead upon the floor of her room; that he knows that he must have shot her, but that he did not remember anything whatever about it.

It needs no discussion of these facts to show that there is nothing whatever in them to justify the inference that the killing of Clara Arnim by the plaintiff in error was the result of an irresistible impulse on his part, or even to suggest the idea that such was the case. The conclusion that these facts tend to show the existence of an uncontrollable impulse can only be supported by holding that an uncontrollable and an unresisted impulse are one and the same thing.

That the prisoner had thought of taking his mistress' life prior to the day on which the homicide occurred, and resisted the impulse to do so, is evident from his own testimony. He ⁴⁹³ says that, on the Sunday evening preceding her death, he had a conversation with her in which she said to him, "Paul, you look so strange; what is the matter with you?" and that he replied to her, "Clara, I have got to take my whole will power together that I don't take you by the throat and strangle you." He further says that, while he was talking with her on this occasion, he made up his mind to commit suicide on the Thursday then following. We are told, on his behalf, that this conversation affords some evidence of the fact that the homicide was the result of an irresistible impulse, but I am unable to see that it has any such effect. Instead of showing the existence of an impulse which could not be controlled, it proves that the impulse which existed in his

mind to take her life was one which he was not only capable of resisting, but was one which he actually did resist on the occasion concerning which he testified.

A careful reading of these proceedings has led me to the conclusion that, when the plaintiff in error purchased the revolver with which he shot Clara Arnim, and the flowers which were found in her hand after her death, he had made up his mind to first shoot her and then himself. He carried out this plan so far as the taking of her life was concerned, but abandoned it when it came to the taking of his own life, although no change seems to have occurred in the circumstances which caused him to determine to kill her and himself. That such a thing as an irresistible impulse to take life sometimes exists in the human mind, I am willing to concede. I do not, however, believe in the uncontrollability of an impulse to kill, which remains irresistible so long as the weapon is directed against another, but ceases to be so when the slayer turns it against himself.

It is further alleged by counsel for the plaintiff in error that the trial court erred in refusing certain requests to charge, and thereby manifestly injured the prisoner. The jury had been instructed by the court that in a case of murder the presumption was that it was of the second degree until the state should establish, by affirmative proof, that the killing was ⁴⁹⁴ willful, deliberate, and premeditated, and the court was then requested to charge that there was no such proof in this case unless effect was given to certain statements made by the prisoner after the killing, and that, if those statements were made by an insane man, they should have no effect. This request was refused, and, in our opinion, properly so. An examination of the case makes it clear that there was testimony, outside of the statements made by the prisoner after the homicide, which would have been sufficient to sustain a verdict of murder of the first degree if the jury had so found.

Another alleged injurious error to which we are pointed by counsel is the admission of certain evidence, against objection, which is said to have been incompetent. The situation was this: The state had proved that the prisoner and the deceased had been for some time living together as man and wife, and proposed to show that a few weeks before the homicide the deceased became engaged to be married to one Bernard Stensel, who thereafter went to Chicago to live. The prosecutor of the pleas then sought to prove that the prisoner, a few days before the shooting, had threatened to kill Stensel if he should meet him, and the court permitted this evidence to be put in against the objection of the

prisoner. It seems to me that this testimony was competent, as tending to show the determination of the prisoner to prevent the marriage of his paramour with Stensel, even if it was necessary to destroy life in order to do so, and as further tending to show that, by reason of the fact that Stensel was beyond his reach, he killed her in order to accomplish that result. But even if the evidence objected to was incompetent, its admission would not justify this court in reversing the judgment under review. The eighty-ninth section of our criminal procedure act (Gen. Stats., p. 1138) declares that no judgment given upon any indictment shall be reversed for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits. In *Hunter v. State*, 40 N. J. L. 495, it is said by this court that, by force of this statute, the admission of illegal testimony will not avoid a judgment ⁴⁹⁵ on error if it plainly appears that such testimony could not have injuriously affected the defendant on the merits of the case. That the admission of the testimony now under consideration could not have injuriously affected the plaintiff in error on the merits, even if it was illegal, is beyond question, for he himself, when upon the witness stand, testified upon his direct examination to making the same threat which was sought to be proved against him by the testimony objected to.

The counsel for the plaintiff in error have not called our attention to any other matter which seems to them to have injuriously affected their client on the trial of this indictment, nor has the careful examination which we have made of the record and proceedings sent up with the writ disclosed the existence of any. On the contrary, that examination and the exhaustive consideration which we have given to this case has satisfied us not only that no injurious error has crept into the trial, but also that the plaintiff in error has not suffered any wrong or injury either "by the rejection of testimony, or in the charge made to the jury, or in the denial of any matter by the trial court which was a matter of discretion, or upon the evidence adduced upon the trial."

The judgment, therefore, should be affirmed.

CRIMINAL LAW—INSANITY AS A DEFENSE—HOMICIDE.—The test of responsibility for criminal acts, where insanity is the defense, is the capacity of the defendant to distinguish between right and wrong at the time, and with respect to the act which is the subject of the inquiry: *Flanagan v. People*, 52 N. Y. 467; 11 Am. Rep. 731; *Cunningham v. State*, 56 Miss. 269; 31 Am. Rep. 300. Compare monographic notes to *State v. Marler*, 36 Am. Dec. 402-411; *Parsons v. State*, 60 Am. Rep. 212-225, discussing insanity as a defense to an indictment for crime.

HOMICIDE—AN IRRESISTIBLE IMPULSE to kill cannot be set up as a defense to murder, so long as the accused knew that the act he was committing was a crime morally, and punishable: *State v. Alexander*, 30 S. C. 74; 14 Am. St. Rep. 879. Compare *Plake v. State*, 121 Ind. 433; 16 Am. St. Rep. 408. In South Carolina, moral insanity or uncontrollable impulse is not a defense against a charge of crime: *State v. Levelle*, 34 S. C. 120; 27 Am. St. Rep. 799. Compare the extended note to *Parsons v. State*, 60 Am. Rep. 212-225, wherein "uncontrollable impulse" is discussed.

APPEAL—IMPROPER EVIDENCE WITHOUT PREJUDICE.—The admission of improper evidence, if not prejudicial, is not reversible error: *St. Louis etc. Ry. Co. v. Hackett*, 58 Ark. 381; 41 Am. St. Rep. 105.

THE PRINCIPAL CASE was approved in *Mackin v. State*, 50 N. J. L. 495, where the crime charged was murder, and the defense interposed was insanity. The jury were instructed, if they should find that the defendant was, by reason of any disease of the mind, at the time of the commission of the fatal act, incapable of distinguishing between right and wrong, in respect to that act which he was then doing, to acquit him of any degree of murder and to find him not guilty. But it was urged, on behalf of the plaintiff in error, that this instruction to the jury of the test to be applied by them in determining whether the insanity of the prisoner, if it existed, was such as to relieve him from responsibility for his act, was erroneous; and it was insisted that the true rule, in cases of this kind should be that if a person, being insane, is impelled, by an irresistible impulse, to do the criminal act, he is not legally responsible for its commission, even if he was able, at the time, to distinguish between right and wrong, and knew the quality of the act done. The court, however, was of the opinion that the jury should be instructed that: "To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong." This was shown to be the English law, as established in *McNaghten's case*, 10 Clark & F. 200, which was adopted in *State v. Spencer*, 21 N. J. L. 196, and which, since that time has been universally accepted by the criminal courts of the state of New Jersey as the test to be applied in cases where insanity has been set up as a defense to an indictment.

SNYDER v. DWELLING-HOUSE INSURANCE COMPANY.

[59 NEW JERSEY LAW, 544.]

INSURANCE—CONSTRUCTION OF STIPULATIONS.—A stipulation, in a policy of fire insurance, that no agent of the company shall have power to waive "any provision or condition" thereof is, in substance, the same as a stipulation that no agent shall have power to change the "terms and conditions" of the policy.

INSURANCE—STIPULATION AS TO WAIVER—LOSS.—A stipulation, in a policy of fire insurance, that no agent of the company shall have power to waive "any provision or condition" thereof, applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be

performed after the loss has occurred, in order to enable the assured to sue upon his contract. Hence, after a loss has happened, conditions in the policy with respect to notice of loss and preliminary proofs may be waived by parol, although the policy contains such a stipulation.

INSURANCE—AGENTS—POWER OF—WAIVER.—A local insurance agent, intrusted with policies of fire insurance in blank, and authorized to issue them upon the application of parties seeking insurance, is thereby clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto.

INSURANCE—CONSTRUCTION OF CONTRACT.—Policies of fire insurance are to be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy.

INSURANCE—CLAUSE AS TO USE OF KEROSENE OIL—CONSTRUCTION.—A policy of fire insurance is not avoided by the use of kerosene oil otherwise than in lamps for illuminating purposes, where the policy provides that "kerosene oil of legal standard may be used for lights only, provided the oil be drawn and the lamps be trimmed and filled solely by daylight," as this restriction is merely a regulation of the use of kerosene oil where used for lighting purposes, and will not be construed to prohibit its use for any other purpose than for lights.

Frank P. McDermott, for the plaintiff in error.

R. Wayne Parker, for the defendant in error.

⁵⁴⁵ **DEPUE, J.** This was an action on a policy of insurance against loss by fire, dated August 27, 1892. The suit was tried in the court of common pleas of Monmouth county, and resulted in a verdict for the plaintiff. The property insured was a dwelling-house situate at Freehold. The fire occurred August 9, 1894. Notice of the loss was promptly given and was received by the company August 11th. The policy requires proof of loss, containing a statement setting ⁵⁴⁶ out several particulars and sworn to, to be rendered to the company within thirty days after the fire. Near the end of the policy is a clause that no suit or action on the policy shall be sustainable unless the insured shall have fully complied with all the requirements of the policy. The policy concludes as follows: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, if any, as properly are or shall be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy."

Proof of loss, such as required by the policy, was not furnished until the latter part of October, which was after the expiration of the thirty days after the fire. To justify the failure to furnish proofs of loss in season the plaintiff relied upon a waiver by

agents of the company. The facts relied on for that purpose are these: Lockwood, the local agent of the company at Freehold, gave the company notice of the loss by a letter dated August 9th, saying also that the Phoenix company had a policy of one thousand dollars on the household furniture. On the 13th or 14th of August, Nichols, a special agent of the company, came to Freehold. Nichols testified that he came there as the company's special agent solely for the purpose of ascertaining the amount of the loss or damage. When Nichols arrived at Freehold, Mr. Walsh, an adjuster representing the Phoenix company, was there. Lockwood testified that Mr. Nichols said to him, in the presence of the plaintiff, "Lockwood, I have arranged with Mr. Walsh to adjust the loss, and I can go on to Philadelphia and save time"; that he, Walsh, and the plaintiff then adjusted the loss at eleven hundred dollars, and the plaintiff signed a paper agreeing to accept that sum from the defendant company. Lockwood further testified that he, at that time, asked the plaintiff if he had the specifications of the loss; that plaintiff said he did not have them then, but the company could have them at almost any time they desired; that he (Lockwood) then said to the plaintiff ⁵⁴⁷ he would wait to see what the company required further. The plaintiff testified that Lockwood, after the paper was signed, told him that he had nothing further to do until he heard from the company in regard to the insurance.

The force of this testimony arises from the fact that Lockwood participated in the adjustment of the loss and advised the plaintiff that he had nothing further to do until he heard from the company. The plaintiff received no information from the company on the subject until, by a letter dated October 11th, signed by the assistant secretary, he was notified that the company disavowed liability upon the policy, for the reason, among other reasons, that proofs of loss had not been given to the company within thirty days.

Lockwood testified that he was the resident representative of the company at Freehold and had charge of issuing policies; that the way policies were issued by him was that the policies were sent to him signed and in blank; that he was to fill up the policy, to issue insurance—either fire, lightning, or tornado—sign them and deliver them to the insured, collect the premiums and forward the premiums, less his commissions, to the company. If the presentation of proofs of loss was capable of being waived otherwise than by agreement indorsed upon the policy, in compliance with its terms, Lockwood's agency was such that the waiver might be made by him, and his acts and assurances were such as

were competent evidence of a waiver. The trial judge gave the instruction to the jury that proofs of loss might be waived by the company by acts and declarations which led the insured to believe that it will not insist upon such a requirement, and that an agent "intrusted with policies of insurance in blank, and authorized to issue them upon the application of parties seeking insurance, is thereby clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto." With these instructions, the questions of fact arising from the evidence were left to the jury. ⁵⁴⁸ These instructions were in conformity with the principle adjudged in *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584. Upon these instructions the supreme court reversed the judgment. In the *Carson* case the language of the policy was that "no agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall be neither changed nor waived except in writing, signed by the president or secretary of the company." The principle adjudged in that case was, that such a stipulation applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue upon his contract, and hence that, after the loss has happened, conditions in the policy with respect to notice of loss and preliminary proofs may be waived by parol, though the policy contain such a stipulation as is above referred to. In the supreme court, the learned judge who prepared the opinion distinguishes this case from the *Carson* case in the fact that in this policy the phrase is "any provision or condition of the policy," whereas in the other case the language was "terms and conditions of insurance." We think this distinction without substance. The word "provision" is a word in common use to express the terms, stipulations, and conditions in deeds, contracts, statutes, and constitutions. "In law [the word 'provision'], is a stipulation; a rule provided; a distinct clause in an instrument or statute; a rule or principle to be referred to for guidance, as the provisions of law, the provisions of the constitution, etc": *Century Dictionary*, "Provisions." Substantially the same definition is given in "*Webster's Dictionary*" and in the "*Encyclopedic Dictionary*." "Proviso," when used, always implies a condition unless subsequent words change it to a covenant: 2 *Bouvier's*

Law Dictionary, 399, "Proviso." The word "provision," in this paragraph, is meaningless if not synonymous with terms and conditions contained in the body of the policy, unless it be ⁵⁴⁹ limited to provisions indorsed upon the policy set out in the preceding member of the sentence. We think the instruction of the trial court, on this head, was correct, and that the reversing judgment of the supreme court should be reversed.

Another assignment of error appears in the record which was not considered in the supreme court. There was a kerosene oil-stove in the shed which was on the premises. The oil-stove was used for cooking. The fire broke out in close proximity to the stove. The lamp in the stove was then burning, but the fire was not caused by an explosion. The policy contains a provision that it should be void if "there be kept, used, or allowed on the above-described premises, naphtha or petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard (which last may be used for lights only, provided the oil be drawn and the lamps be trimmed and filled solely by daylight)."

The only legal standard for petroleum or any of its products is that specified by the act of 1883. That act provides that "only such product of petroleum as will not flash at a less temperature or flash test than one hundred degrees Fahrenheit, may be sold for lighting or illuminating purposes, except when the same is to be used in street lamps or open-air receptacles or in gas machines, in which case (as to petroleum or kerosene) there shall be plainly marked on the barrel, can, or vessel in which the same is sold, etc., the words, 'Not for inside lights'": Gen. Stats., p. 2454. No standard is prescribed by this statute except for lighting or illuminating purposes—"inside lights." In fact, the kerosene oil used in the kerosene stove was of the standard of one hundred and fifty degrees Fahrenheit flash test, which is above the standard mentioned in the statute.

The contention is, that the policy, by force of the above provision, was avoided by the use of kerosene otherwise than in lamps for illuminating purposes. The result of this contention depends upon the construction and effect of the clause of the policy above set out. It is a settled rule in the construction ⁵⁵⁰ of contracts of insurance that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy: *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584. In *Stone v. United States Casualty Co.*,

34 N. J. L. 371, 375, Chief Justice Beasley said: "A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of the indorsement will bear no other rational interpretation. If the terms used are imperfect, it is the fault of the defendants. It is their contract, and the construction of it must be most strongly against them." The principal member of this clause, "if there be kept, used, or allowed on the above-described premises . . . petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard," is not broken by the use made of kerosene in this instance. The defense rests upon the other member of the sentence which is inclosed in brackets, viz., "which last [i. e., kerosene oil of legal standard] may be used for lights only, provided the oil be drawn and the lamps be trimmed and filled solely by daylight." This member of the sentence imports a regulation of the use of kerosene oil when used for lighting purposes, and the words used are capable of a construction which would give to it no other effect. If the insurer intended to prohibit the use of kerosene for any other purpose than for lights, it would have been easy to so express the prohibition in its policies. Policies of insurance against fire are taken out by all classes of persons, educated and uneducated, and no rule of law is more salutary than that conditions in these instruments, expressed in terms ambiguous and capable of misleading, shall not be allowed to avoid the contract. The member of the sentence within the brackets, to say the least, is confusing and ambiguous when taken in connection with the words which precede it, and should not be allowed to make void this policy under the circumstances of this case.

⁵⁵¹ The judgment of the supreme court should be reversed, and the judgment of the common pleas restored.

INSURANCE—WAIVER—CONSTRUCTION OF STIPULATIONS. Conditions of a policy of insurance in respect to notice and proofs of loss may be waived by an insurance agent, by parol, in spite of a provision that no agent can change the terms or conditions and that the same shall not be changed or waived except in writing signed by the president or secretary: *Carson v. Jersey City etc. Ins. Co.*, 83 N. J. L. 300; 39 Am. Rep. 584. A clause in a policy of insurance prohibiting a waiver, by reason of the act of any agent, unless such waiver is specially authorized in writing over the signature of the president, etc., does not extend to stipulations of conditions to be performed after a loss occurs, such as giving notice, furnishing proof, etc: *Note to Menk v. Home Ins. Co.*, 9 Am. St. Rep. 153; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216, and extended note thereto, at page 234, where the matter is discussed. Proof of loss may be waived orally, though the policy requires waivers to be in writing: *Burlington Ins. Co. v. Lowery*, 61 Ark. 108; 54 Am. St. Rep. 196.

INSURANCE—POWER OF AGENTS—WAIVER.—An insurance agent authorized to take risks and to issue policies has authority to waive, by parol, a condition in a policy issued by him: *Notes to Ermentrout v. Girard etc. Ins. Co.*, 56 Am. St. Rep. 488; *Berry v. American Cent. Ins. Co.*, 28 Am. St. Rep. 555; *Viele v. Germania Ins. Co.*, 96 Am. Dec. 113. A local insurance agent has power to bind his company by acts within the apparent scope of his general authority: *Hahn v. Guardian Ins. Co.*, 23 Or. 576; 37 Am. St. Rep. 709; note to *Viele v. Germania Ins. Co.*, 96 Am. Dec. 113.

INSURANCE—CONSTRUCTION OF CONTRACT.—The terms of fire insurance policies are to be liberally construed in favor of the insured to give effect to the contract: *Schuermann v. Dwelling-House Ins. Co.*, 161 Ill. 437; 52 Am. St. Rep. 377, and note; *Weston etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703; and, as forfeitures are not favored, the contract will be so construed, if possible, as to waive a forfeiture: Note to *Murray v. Home etc. Assn.*, 25 Am. St. Rep. 137.

INSURANCE—HAZARDOUS ARTICLES—PRIVILEGE—PROHIBITION.—A policy of fire insurance prohibited the use of camphene, spirit gas, burning fluid, or chemical oils, but permitted the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps filled by daylight. The insured used lard oil and candles for lights, filling the lamps at night, and it was held that there was no breach of condition: *Carlin v. Western Assur. Co.*, 57 Md. 515; 40 Am. Rep. 440. Compare *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450; 13 Am. St. Rep. 582.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

DONAHUE v. KELLY.

[181 PENNSYLVANIA STATE, 92.]

NEGLIGENCE—GASOLINE—CONSTRUCTION OF STATUTE.—One who keeps gasoline on his premises for illuminating purposes only, and not for sale, is not guilty of negligence in thus keeping it, under a statute which prohibits the keeping of gasoline for sale unless it is of a certain fire test. The statute has no application to such case.

NEGLIGENCE—SUDDEN EMERGENCY.—A restaurant keeper, whose servant grasps a burning lamp, and in attempting to carry it from the room is burnt, and then throws the lamp from him, when it explodes and injures a customer, is not liable in damages for such injury.

NEGLIGENCE—SUDDEN PERIL.—One who, in a sudden emergency, acts according to his best judgment, or who, by reason of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence.

NEGLIGENCE—SUDDEN AND UNUSUAL PERIL.—There is no liability for an injury inflicted by one person upon another, even though the injured person is free from fault, if the cause of the injury is unusual, and one which reasonable and careful foresight could not have foreseen, and which, under the circumstances, such care and foresight could not have guarded against. Such injury, without want of ordinary care on the part of the person inflicting it, is an inevitable accident.

Trespass for personal injuries. Defendant's servant, employed in his restaurant, discovered a burning and dangerous gasoline lamp, and, taking it up, attempted to carry it away. In doing this his clothing caught fire. He then threw the lamp from him, when it exploded and severely injured the plaintiff, who suffered a judgment of nonsuit and appealed.

J. M. Beck, W. F. Harrity, and J. T. Murphy, for the appellant.

A. J. Maloney, for the appellee.

GREEN, J. It is beyond all question that the cause of the unfortunate injury suffered by the plaintiff, was the act of Clegeth in throwing the burning lamp. That he was trying to throw it out of the door was affirmatively proved by the plaintiff's witness Monaghan, and was not at all disputed. In the passage of the lamp through the air it exploded, according to the testimony of Monaghan, and the burning fluid falling upon the plaintiff caused his injury. It is suggested by the learned counsel for the plaintiff that the defendant was negligent in merely having the gasoline on his premises, under the provisions of the act of May 15, 1874, and that this would be sufficient to support the allegation of negligence upon which the right of recovery is based. But an examination of the act does not support the contention. The first section provides that "no refined petroleum, kerosene, naphtha, benzole, gasoline, or any burning fluid, be they designated by whatsoever name, the fire test of which shall be less than one hundred and ten degrees Fahrenheit, shall be sold or offered for sale as an illuminator for consumption within the commonwealth of Pennsylvania." It is very plain that this section can have no application to the facts of this case. There was no proof that this gasoline was of less than one hundred and ten degrees Fahrenheit, and there was no evidence that the defendant either sold or offered for sale this or any other gasoline. He was, therefore, not subject to the terms of this section. Section 8 provides that: "All benzine, naphtha, or any hydro-carbons created in the manufacture of refined oil from crude petroleum, or otherwise manufactured, shall be inspected and branded 'benzine,' and shall not be kept for sale or ^{or} used in any way for giving light to be burned in lamps." This section does not include gasoline, nor refer to it in any way. There was no evidence to prove that the gasoline used by the defendant was explosive within the prohibition of the act, or that it was necessarily dangerous for use in lamps. The fifth section of the act merely provides penalties for violations of the provisions of the act. It is apparent, therefore, that the charge of negligence for the purposes of recovery in this action cannot be sustained by the application of the act in question. The question then recurs, Was the defendant liable as for culpable negligence on account of the act of his employé in throwing the lamp as he did? It is not to the purpose that the jury might have found the defendant guilty of negligence for the several reasons mentioned in the argument for the appellant, because the plaintiff's injury was the manifest result of the throwing of the lamp, and not of any of the other

matters suggested. The inquiry is thus narrowed by the actual state of the testimony which is entirely undisputed.

The principles which control the judicial contemplation of such an act are extremely simple and thoroughly well settled. The testimony, all of which was introduced by the plaintiff, clearly shows that the act of the employé who threw the lamp was done at a moment when he himself was in flames, and as an indispensable and urgent act of self-preservation. He was endeavoring to remove the lamp from the room, an entirely proper and commendable action. To do this he had taken it in his hands and was proceeding toward the door when the flames emitted from the burning fluid attacked him and threatened him with most serious and, possibly, fatal results. To escape from this calamity he instinctively threw the lamp from him; but not until he was severely burned. Such an act, done in such extreme circumstances, is not to be judged by the rules which are applicable ordinarily to acts done in cool blood, with time and opportunity for the party to consider the consequences and the methods of the act he is about to do. The decisions of this and other courts are very numerous, in the application of the principle to cases in which persons suddenly placed in positions of peril and impending danger do things which ordinarily would be acts of negligence. The same principle applies where innocent third persons sustain injuries from acts done in similar ^{or} circumstances. The doctrine is well expressed in Pollock on Torts, edition of 1887, star page 149, thus: "As to injuries received by an innocent third person from an act done in self-defense, they must be dealt with on the same principle as accidental harm proceeding from any other act lawful in itself. It has to be considered, however, that a man repelling imminent danger cannot be expected to use as much care as he would if he had time to act deliberately." A suitable illustration of the doctrine is to be found in the case of *Brown v. French*, 104 Pa. St. 604, where we held that one who in a sudden emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence. Such act or omission, if faulty, may be called a mistake, but not carelessness. The plaintiff's husband in this case attempted to cross the Ohio river in a skiff at a dangerous place and lost the control of his boat which fouled a barge in tow of a steamer. Efforts were made by one of the steamer's crew to rescue him, but they were unavailing and he was drowned. His wife brought an action against the owners of the steamer for dam-

ages for her husband's death, alleging negligence in the efforts made to save him. Gordon, J., delivering the opinion, said, "Nevertheless as we have said, an attempt was made to save his life; unfortunately, it was unsuccessful, and it is now said that the effort was misdirected, or not properly seconded by the pilot of the steamer; that the boat ought to have been backed. Well, let it be so, that by a manoeuvre of that kind this man's life could have been saved; does it follow that it was an act of carelessness not to have done so? Certainly not. Here was an accident sprung upon the pilot for which he was wholly unprepared. In order to avoid the consequences of it, he must first understand accurately its nature and probable effect; he must then determine what was best to be done, and this determination must be had in view of all the circumstances by which he and his craft were surrounded. All this required time, but the time allowed in this case was too short for any but an exceptionally active mind to entertain and execute a successful plan of rescue. Under such circumstances, we cannot agree that a mistake in judgment is an act of carelessness." Just so in the present case. When Clegett, in his effort to remove the lamp, discovered that he was himself in ^{so} flames and therefore cast it from him toward the door, his act must be regarded as being done upon a sudden and unexpected emergency, subjecting him to imminent peril. He had no time to consider what was best to be done, or how he could best avoid doing injury to others. His instinct of self-preservation prompted him to cast from him the implement which threatened his life, and for so doing he is not to be charged with an act of negligence as to others.

In the celebrated case of *Scott v. Shepherd*, 2 W. Black. 892, 1 Smith's Lead. Cas., 9th ed., p. 737, commonly called the Squib case, it was agreed by all the judges that the intermediate throwers of the squib between the first thrower and the plaintiff were not liable for the injury to the plaintiff, because their acts were done in self-defense. De Grey, C. J., said: "It has been urged that the intervention of a free agent will make a difference, but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsory necessity for their own safety and self-preservation." In 16 American and English Encyclopedia of Law, 396, it is said: "There is no liability for an injury inflicted by one person upon another, even though the injured person be free from fault, if the cause of the injury was unusual, and one which reasonable and careful human foresight could not have foreseen as such, and which, under the circumstances, such care and foresight could not have guarded against."

Such an injury, without any want of ordinary care upon the part of the person inflicting it, is considered an inevitable accident": Citing many cases in the notes. In the case of *Brown v. Kendall*, 6 Cush. 292, the plaintiff's and the defendant's dogs were fighting; the defendant was beating them in order to separate them, and the plaintiff was looking on. The defendant retreated backward from before the dogs, striking them as he retreated, and as he approached the plaintiff, with his back toward him, in raising the stick over his shoulder in order to strike the dogs, he accidentally hit the plaintiff in the eye inflicting a severe injury. It was held that the act of the defendant was a proper and lawful act, and if he used all proper precautions necessary to the exigency of the case, and, in raising his stick to strike the dogs, he accidentally hit the plaintiff in the eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie.

¹⁰⁰ It would be very easy to multiply citations to the same effect, but it is quite necessary. The controlling principle applicable to all is thoroughly familiar and is not disputed. In our opinion, it controls the determination of the present case.

Judgment affirmed.

NEGLIGENCE—CONDUCT IN GREAT PERIL.—That one does not adopt the safest and best course to avoid injury when suddenly exposed to great and imminent danger does not make him chargeable with negligence: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140; 46 Am. St. Rep. 420, and note. One's duties under any circumstances are measured by the exigencies of the occasion: *Harker v. Burlington etc. Ry. Co.*, 88 Iowa, 409; 45 Am. St. Rep. 242, and note. See, also, *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; 55 Am. St. Rep. 620, and note.

STATUTES—KEEPING OR USING DANGEROUS AGENCIES. One using extrahazardous materials or instrumentalities may be made to bear the risk and pay the loss thereby occasioned to another: *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447; 1 Am. St. Rep. 138. Or the legislature may declare the possession of certain property to be unlawful where such property would be dangerous, injurious, or noxious: *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381.

HENRY CHRISTIAN BUILDING AND LOAN ASSOCIATION v. WALTON.

[181 PENNSYLVANIA STATE, 201.]

CONTRACTS—RATIFICATION OF ILLEGAL CONTRACTS
The right to avoid a contract on the ground of fraud is a privilege given to the injured party for his own protection, and it may be waived: but he cannot ratify and give validity to an illegal contract.

CONTRACTS—RATIFICATION OF ILLEGAL CONTRACTS.
If a transaction is contrary to good faith, and the fraud affects individual interests only, ratification is allowed, but, when the fraud is of such character as to involve a crime, the adjustment of which is

forbidden by public policy, ratification of the act from which it springs is not permitted.

FORGERY DOES NOT ADMIT OF RATIFICATION.—Hence, if a mortgage upon which an action is founded is a forgery, there can be no ratification of it, and it is not binding on the mortgagor.

Action to collect the balance due upon a mortgage, to which the defense was made that the mortgage was a forgery. Verdict sustaining this contention, and judgment for the defendant. Plaintiff appealed.

J. P. McCullen and J. T. Murphy, for the appellants.

J. M. Yeakle, and M. Stevenson, for the appellee.

²⁰⁶ FELL, J. The distinction between the power to ratify acts void because of a fraud affecting individual interests only and the power to ratify acts which involve a public wrong has been carefully defined and preserved in our decisions. The right to avoid a contract on the ground of fraud is a privilege given to the injured party for his own protection, and it may be waived; but he cannot give validity to an illegal contract. The earlier cases which held that all contracts vitiated by fraud are insusceptible of confirmation are in effect overruled by *Pearsoll v. Chapin*, 44 Pa. St. 9, and *Negley v. Lindsay*, 67 Pa. St. 217, 5 Am. Rep. 427. The distinction between the cases pointed out in the opinions in *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702, and *Lyon v. Phillips*, 106 Pa. St. 57, is this: where the transaction is contrary to good faith and the fraud affects individual interests only, ratification is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery does not admit of ratification. A forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits, and the subsequent adoption of the instrument cannot supply the authority which the forger did not profess to have. "A forged bond or note obviously wants the essentials of a contract because the intention is not to bring the minds of the obligor and obligee together, but to practice a fraud on both": *Hare on Contracts*, 285.

²⁰⁷ All of the assignments of error which were insisted upon at the argument relate to the instruction given to the jury that if the mortgage upon which the action was founded was a forgery there could be no ratification of it, and that no act of the defendant thereafter could make it binding upon him. There can be no doubt of the correctness of the first part of this instruction, and, in view of the evidence, the whole of the instruction

was free from error. Magee, who committed the fraud, was the accredited agent of the building association, and represented it in the preparation of the mortgage. He may have represented the defendant in other matters, but there was not the slightest evidence of his agency for the purpose of executing the mortgage. Nor was there evidence of any act of the defendant upon which to base an equitable estoppel. The attempt to bring the case within the principle of the decision in *Garrett v. Gonter*, 42 Pa. St. 143, that a deed or contract executed by a professed agent acting under a pretended authority may be confirmed, failed for want of proof.

The judgment is affirmed.

Contracts Which Cannot be Ratified.*

Contracts which are absolutely void, by reason of being in violation of a statute, or as being opposed to public policy because without consideration, immoral, or for some other reason, cannot be ratified or confirmed by subsequent acts or agreement of the parties; *Insurance Co. v. Hull*, 51 Ohio St. 270; 46 Am. St. Rep. 571; *Shippey v. Eastwood*, 9 Ala. 198; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 230; *Pettit v. Pettit*, 32 Ala. 288; *Moog v. Hannon*, 93 Ala. 503; *Workman v. Wright*, 33 Ohio St. 403; 31 Am. Rep. 546; *Chapman v. Lee*, 47 Ala. 143; *Shenk v. Phelps*, 6 Ill. App. 612; *Thompson v. Warren*, 8 B. Mon. 488, 491; *Fireman's Assn. v. Berghaus*, 13 La. Ann. 209; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Negley v. Lindsay*, 67 Pa. St. 217; 5 Am. Rep. 427; *Hunter v. Nolf*, 71 Pa. St. 282; *Chamberlain v. McClurg*, 8 Watts & S. 81; *Shelton v. Marshall*, 16 Tex. 844. An illegal contract is incapable of ratification or of becoming the consideration of a subsequent promise: *Boutelle v. Melendey*, 19 N. H. 193; 49 Am. Dec. 152.

• "Contracts and acts that are absolutely void are contracts to do an illegal act, or omit a legal public duty, usually bonds of married women, contracts in a form forbidden by law, official acts of persons having no recognized title to office, contracts to do an impossible thing, or that leave uncertain the thing to be done, and the like. These are absolutely void, because they have no legal sanction, and establish no legitimate bond or relation between the parties, and so when the contract is, in substance or in essential form, illegal, neither party can ratify it, because the wrong done is against the state, and it only can forgive it. For this sort of wrong there can be no private ratification. A ratification that leaves the vice unpurged and unforgiven is itself null": *Pearsoll v. Chapin*, 44 Pa. St. 14, 15. "It is well settled that where an original contract is illegal, any subsequent contract which carries it into effect is also illegal, and whenever, in cases of this character, the subject matter of the contract can be traced back, between privies, to an original illegal contract, the substituted security is void, and even if the parties liable in the

*REFERENCE TO MONOGRAPHIC NOTES.

Ratification of forged signature: 14 Am. Rep. 108, 109. Also, 5 Am. St. Rep. 612-622.
Ratification of contracts of infants: 18 Am. St. Rep. 600 et seq.

last security were not privy to the illegal bargain, the same result has been held to prevail, if the true destination of such security was to secure such a bargain, made by others, for the use of him who was to reap the fruits of the bargain": *Shelton v. Marshall*, 16 Tex. 344; *Kountz v. Price*, 40 Miss. 341. If a debt is invalid by reason of the illegality of its consideration, it cannot be ratified nor made valid by a new promise for its payment: *Blick v. Seal*, 45 Mo. App. 475. The rule that a contract made in violation of a statute, being absolutely void, cannot be ratified (*Penn v. Bornman*, 102 Ill. 523), has often been applied to sales of liquors without first taking out the license required by statute. It has been held that such sales are absolutely void, and that the contract cannot be ratified by the subsequent act of the parties, as by a part payment of the purchase price: *Moog v. Hannon*, 93 Ala. 503; *Alexander v. O'Donnell*, 12 Kan. 608; *Miller v. Ammon*, 145 U. S. 421. And a contract which is usurious cannot be ratified and confirmed by subsequent act so as to make it available to either party: *Chamberlain v. McClurg*, 8 Watts & S. 31; *United States Bank v. Owens*, 2 Pet. 527. A contract, void because it stipulates for doing what the law prohibits, is incapable of being ratified as a whole, even if the law is so changed after the contract is made, and before it is fully performed, as to make it valid after the change went into effect. Every contract must be ratified, if at all, as an entirety: *Handy v. St. Paul etc. Pub. Co.*, 41 Minn. 188; 10 Am. St. Rep. 695. A contract which is opposed to public policy is void, and no subsequent acts of ratification can validate it: *Rue v. Missouri Pac. Ry. Co.*, 74 Tex. 474; 15 Am. St. Rep. 852; *Wills v. Abbey*, 27 Tex. 203; *Hunter v. Nolf*, 71 Pa. St. 282. If two parties are applicants for an office to be obtained by appointment, and one agrees to withdraw, the other stipulating that, if he shall receive the appointment, he will divide the receipts of the office with the party withdrawing, such agreement is opposed to public policy and void, and an alleged agreement made after such appointment on the same terms is also void as being in pursuance of the original agreement which cannot be ratified: *Hunter v. Nolf*, 71 Pa. St. 282.

Agency.—Acts of persons assuming an illegal agency cannot be subsequently ratified: *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *Workman v. Wright*, 33 Ohio St. 405; 31 Am. Rep. 546. A sheriff is the agent appointed by law, of both the plaintiff and defendant for the sale of the defendant's property, and his purchase of such property at a sale made by him is absolutely void, and cannot be ratified: *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435. An infant cannot empower an agent or attorney to act for him, and, as he cannot ratify what he cannot authorize, he cannot, during his infancy, ratify what another has assumed to do in his name as an agent or attorney: *Armitage v. Widoe*, 36 Mich. 124. An agent cannot ratify an act done by himself or his servant beyond the scope of his agency, so as to bind his principal: *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795. Thus, if the articles of a joint stock association prohibits its officers intrusted with the conduct of its business from making purchases on credit, and they nevertheless make such purchase, they cannot themselves ratify such unauthorized act: *Hotchin v. Kent*, 8

Mich. 526. A municipal corporation, through its officers or agents, cannot ratify a contract which it has no power to make in the first instance: *Horton v. Thompson*, 71 N. Y. 513. Nor can it ratify an act which it would have been positively unlawful for it to do: *Highway Commrs. v. Van Dusan*, 40 Mich. 429. There may, in certain cases, be a ratification by a municipal corporation of an unauthorized contract, but the contract must be one which in the first instance could have been legally entered into by the corporate authorities; and, in some cases, the acceptance and appropriation of work done for the use and benefit of the corporation under an unauthorized contract may amount to a ratification, when it is done with full knowledge of all the facts: *Taymouth v. Koehler*, 35 Mich. 22.

If the officers of a municipal corporation fail to pursue the strict requirements of the statute in making a corporate contract, the municipality is not bound, nor is it bound by any act of its officers in ratification of such illegal contract. A person dealing with a municipality is bound to see that the statute under which it is acting is fully complied with; and, when this is not done, no subsequent act of the officers of the municipality can make the contract effective: *Smith v. Newburgh*, 77 N. Y. 130; *Board of Supervisors v. Arrighi*, 54 Miss. 668; *San Diego Water Co. v. San Diego*, 59 Cal. 517. A conveyance of the real property of a municipality which is unauthorized and void cannot be validated by parol acts of ratification and acquiescence: *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29.

If fraud is practiced upon the stockholders by the promoters of a corporation, knowledge of it by the directors is not knowledge by the stockholders, and such fraud cannot be ratified or waived by the directors: *Burbank v. Dennis*, 101 Cal. 90.

Married Women.—A married woman is incapable of contracting unless power is expressly given her by statute. All other contracts made by her during coverture are absolutely void and incapable of ratification: *Macfarland v. Heim*, 127 Mo. 327; 48 Am. St. Rep. 629. And a bond or other unauthorized contract executed by a married woman does not become binding upon her after discoveriture by mere naked ratification by her, or by a simple acknowledgment of her signature. She must execute a new instrument: *Nesbitt v. Turner*, 155 Pa. St. 429; *Brown v. Bennett*, 75 Pa. St. 423; *Buchanan v. Hazard*, 95 Pa. St. 243.

Fraud.—In accordance with the rule laid down in the principal case, it may be stated that if a contract is tainted with such fraud as to involve a crime or public wrong, it is incapable of ratification, but, if the fraud affects only private and individual interests, the contract may be ratified without a new consideration. Thus, in *Lyon v. Phillips*, 106 Pa. St. 57-66, the court said: "It is certainly true that contracts which are forbidden by statute, or are inconsistent with public policy, are absolutely void, and the ratification of such a contract in any form, carries with it the taint of the original. So, where fraud is of such a character as to involve a public wrong or a crime, the adjustment of which public policy forbids, the ratification of the act in which the fraud originates is also opposed to public policy, and cannot be permitted; the confirmation is held to be a fraud in

law as the original was a fraud in fact, but where the transaction is contrary only to good faith and fair dealing, where it affects individual interests and nothing else, ratification is allowable"; and to the same effect is *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702.

Forgery.—There is an unfortunate conflict in the authorities on the subject as to whether the act of forgery is subject to ratification or not. Many well-considered cases hold that as forgery of an instrument involves a crime and public wrong, besides being opposed to public policy, it cannot be ratified so as to bind the person whose name has been forged, in the absence of an estoppel in pais, without a new consideration for the promise. Among the cases of this nature may be cited *Henry v. Hebb*, 114 Ind. 275; 5 Am. St. Rep. 613; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; 5 Am. Rep. 445; *Workman v. Wright*, 33 Ohio St. 405; 31 Am. Rep. 546; *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702; *Woodruff v. Munroe*, 33 Md. 146. On the other hand, the weight of authority is to the effect that one whose name has been forged can ratify the act and be bound thereby. These latter cases proceed upon the theory that one whose signature has been forged, but who, with knowledge of the facts and intending to be bound by it, acknowledges the signature, ratifies it, and thus assumes the obligation as his own, and is bound to the same extent as if the obligation had been signed by him originally, without regard to whether or not his acknowledgment amounts to an estoppel in pais. Of this class of cases may be mentioned *Willington v. Jackson*, 121 Mass. 157; *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106; *Bartlett v. Tucker*, 104 Mass. 336-341; 6 Am. Rep. 240.

Another line of cases maintaining that forgery may be ratified turn upon the proposition that the holder of the obligation has in some way acted in reliance upon the promise or admission of the person whose name appears thereon, or that the latter has received or participated in the consideration for which the obligation was given, and is therefore estopped to deny the genuineness of his signature. Of this latter class of cases may be cited *Corser v. Paul*, 41 N. H. 24; 77 Am. Dec. 758; *Forsyth v. Day*, 46 Me. 176; *Union Bank v. Middlebrook*, 33 Conn. 95; *Crout v. De Wolf*, 1 R. I. 393. This whole subject has been thoroughly investigated and excellently treated in *Henry v. Hebb*, 114 Ind. 275; 5 Am. St. Rep. 613; and in an extended note appended to that case, pages 618-621, and, as all of the cases are therein collected and the distinctions existing between them pointed out, the topic will receive no further consideration here.

Sunday Contracts.—The general rule that, when the consideration of a contract is either prohibited by statute or contrary to public policy, the contract is absolutely void and incapable of ratification, has been applied in many cases to contracts made on Sunday in violation of statutes. It has been decided that the effect of a statute forbidding "worldly employment or business on Sunday" is to render void every transaction which, if performed on a week day, would be enforceable in a court of justice: *Reeves v. Butcher*, 31 N. J. L.

224. And that a contract made or entered into on Sunday is incapable of being confirmed or ratified by any act of the parties done on a subsequent and secular day, unless such subsequent act substantially amounts to a new contract: *Plaisted v. Palmer*, 63 Me. 576; *Meador v. White*, 66 Me. 90; 22 Am. Rep. 551; *Winfield v. Dodge*, 45 Mich. 355; 40 Am. Rep. 476; *Bradley v. Rea*, 103 Mass. 188; 4 Am. Rep. 524; *Ryno v. Darby*, 20 N. J. Eq. 230; *Day v. McAllister*, 15 Gray, 433; *Cranson v. Goss*, 107 Mass. 439; 9 Am. Rep. 45. A note given on Sunday for money lent, in pursuance to a previous understanding to that effect is void, and subsequent payments of interest thereon are not sufficient to ratify or give validity to the note: *Reeves v. Butcher*, 31 N. J. L. 224. Nor can a subsequent promise to pay such a note ratify it, or make it valid: *Pope v. Linn*, 50 Me. 83. The same rule has been applied to a loan of money made on Sunday: *Finn v. Donahue*, 35 Conn. 216. If a lease is executed on Sunday, and the lessee enters into possession on that day, the lease is absolutely void, and incapable of ratification: *Vinz v. Beatty*, 61 Wis. 645. The reason given by the courts why such a contract is incapable of ratification is, that in suing upon the original contract after its ratification by the defendant, it would still be necessary for the plaintiff in proving his case to show his own illegal act in making the contract at first, and he cannot be permitted to trace his title through an illegal act: *Finn v. Donahue*, 35 Conn. 216. Contracts made and completed on Sunday are illegal and void and incapable of subsequent ratification on a secular day. If the terms of the contract are settled on Sunday, and the execution of it deferred to the next or some other day, the contract is void and incapable of ratification, but, if the contract has its mere inception on Sunday and is completed on a secular day, it is not illegal and may be ratified: *Kountz v. Price*, 40 Miss. 341. If the contract is partially completed on Sunday, nothing done subsequent to that day relieves the transaction of the taint of illegality, nor can constitute a ratification unless such subsequent act amounts to substantially a new contract: *Plaisted v. Palmer*, 63 Me. 577. Taking the weight of authority as a basis, the better rule undoubtedly is, that though a contract entered into on Sunday is void, or at least voidable, yet if it is ratified upon a secular day, it then becomes as valid and binding as though entered into in the first instance upon a week day. A great many cases hold that a contract made on Sunday is void, but that the parties thereto may, on a subsequent week day, affirm, adopt, and ratify the terms of the previously inoperative contract, and so become bound to perform them: *McKinney v. Demby*, 44 Ark. 74; *Williams v. Lane*, 87 Wis. 152; *Van Hoven v. Irish*, 3 McCrary, 443; *Kuhns v. Gates*, 92 Ind. 66; *Evansville v. Morris*, 87 Ind. 269; 44 Am. Rep. 763; *Perkins v. Jones*, 26 Ind. 499; *Adams v. Gay*, 19 Vt. 358; *Smith v. Case*, 2 Or. 191; *Banks v. Werts*, 13 Ind. 203; *Harrison v. Colton*, 31 Iowa, 16; *Heavenridge v. Mondy*, 34 Ind. 28-36. "Contracts of this character are not, however, rendered void as being illegal at common law, but their illegality consists merely in being mala prohibita, not mala in se, and they may be made obligatory by the subsequent act of the parties": *Perkins v. Jones*, 26 Ind. 499-501. "Contracts made upon Sunday should be held an exception in some

sense from the general class of contracts which are void for illegality. They are not tainted with any general illegality, but are illegal only as to the time in which they are entered into. It is not sufficient, to avoid them, that they have grown out of a transaction entered into upon Sunday; they must be finally closed upon that day, and although closed upon that day, yet, if ratified upon a subsequent day, they then become valid": *Adams v. Gay*, 19 Vt. 358. "The illegality which attaches to a contract executed on Sunday is not an illegality which enters into the subject matter or essence of the contract, and for that reason renders it void. Such contracts, only being illegal on account of the day on which they are made, are capable of ratification by any act which fairly recognizes them as existing contracts, on a subsequent week day, like a promise to perform, or pay the amount stipulated therein, or a part payment of the same, or a refusal to return property fraudulently obtained by such contract, or an offer to rescind by the other party and a demand for the return of the property: *Lovejoy v. Whipple*, 18 Vt. 379; 46 Am. Dec. 157; *Adams v. Gay*, 19 Vt. 358; *Sargeant v. Butts*, 21 Vt. 99; *Summer v. Jones*, 24 Vt. 817. These cases go to the full length of holding that any act done by the parties on a week day which recognizes it as a contract existing between them is a ratification": *Flinn v. St. John*, 51 Vt. 334. A note executed on Sunday may be ratified by a promise made on a week day to pay it: *Tucker v. West*, 29 Ark. 386; or by a partial payment made on it on a secular day: *Russell v. Murdock*, 79 Iowa, 101; 18 Am. St. Rep. 348. Or, if a note is made on Sunday, and placed in the hands of an agent, to be delivered to the payee, and it is afterward so delivered, and subsequently the maker promises to pay the note, this is a ratification: *Clough v. Davis*, 9 N. H. 500. A receipt of the purchase money by a vendor on a week day for a sale of land made on Sunday is an affirmance and ratification of the contract: *McKinney v. Demby*, 44 Ark. 74. If an official bond is signed by a surety on Sunday and handed to the principal, who afterward hands it to the proper officer on a secular day, who receives and approves it, there is a ratification and the surety is bound: *Evansville v. Morris*, 87 Ind. 269; 44 Am. Rep. 763. A contract for the payment of money, though fully made and completed on Sunday, is ratified and rendered valid and binding by a subsequent promise made by one of the parties on a secular day, to pay it: *Sargent v. Butts*, 21 Vt. 99. A promise made on a week day to pay for liquors sold and delivered on Sunday ratifies the sale: *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. St. Rep. 605. If the terms of a settlement of a claim for damages are agreed to on Sunday, and it is subsequently executed and carried into effect on a week day, it is thereby ratified and binding: *Taylor v. Young*, 61 Wis. 314. If a party buys property on Sunday, in consideration of an antecedent debt, and on a succeeding week day sends a receipt to the vendor for both the property and the debt, the contract is thereby ratified: *Wilson v. Milligan*, 75 Mo. 41. If the terms of sale of oxen are made on Sunday, subject to the purchaser's inspection and he inspects and takes them on the following day, and then pays part of the purchase price, the sale is valid: *Moseley v. Vanhooser*, 6 Lea, 286; 40 Am. Rep. 37. A sale made on Sunday, but ratified on a

secular day by a retention of the property by the vendee, and a promise to pay for it, is a valid contract, the retention of the property being the consideration for the promise to pay. This retention of the consideration for the contract, or of property obtained on Sunday with a subsequent acknowledgment of the contract, is, by many courts, considered a sufficient ratification to render valid an otherwise illegal contract: *Sayles v. Wellman*, 10 R. I. 465; *Williamson v. Brandenburg*, 6 Ind. App. 97; *Gwinn v. Simes*, 61 Mo. 335; *Sumner v. Jones*, 24 Vt. 317; *Campbell v. Young*, 9 Bush, 240. "As a general rule, void contracts cannot be ratified, but there is an exception in favor of contracts void for having been made on Sunday, which may be ratified upon a consideration which essentially makes a new contract, as when property or something of value has been obtained through the means of a contract made on that day, and a promise afterward made to pay for it. In such case keeping the property and making the promise constitute the new contract or ratification. But while the contract remains unexecuted, when nothing has passed between the parties, and they remain as they were at the time the contract was made, a mere promise to execute it will have no validity or constitute a ratification": *Catlett v. Trustees*, 62 Ind. 365; 30 Am. Rep. 197.

HEY v. GUARANTOR'S LIABILITY INDEMNITY Co.

[181 PENNSYLVANIA STATE, 220.]

ACCIDENT—DEFINITION.—An accident is an unusual or unexpected result attending the operation or performance of a usual or necessary act or event.

INSURANCE—ACCIDENT—FLOOD.—Damage to insured property from a "sudden rise of the water," or a flood, is damage by accident within the meaning of an insurance policy indemnifying against loss from any accidental damage, "excepting only damage by fire or lightning."

INSURANCE—EXCEPTIONS—LIABILITY.—The exception of one from a number of like causes of damage to or destruction of insured property is a recognition by the insurer of his liability for loss arising from other causes of like nature.

INSURANCE—PRESUMPTION AS TO NATURAL PERILS. An insurance company is presumed to know that which is obvious in regard to the property insured, including the natural perils to which it is exposed, such as the fact that it is situated on the bank of a river.

INSURANCE—CONCEALMENT OF MATERIAL FACTS.—In the absence of express stipulation, and where no inquiry is made, a failure to state facts known to the insured or his agent, or which he ought to know, is no concealment. Failure to state that property insured is situated on the bank of a river is not a concealment of a material fact.

J. H. Gendell, for the appellant.

F. S. Cantrell and F. S. Cantrell, Jr., for the appellee.

223 **McCOLLUM, J.** The policy in suit contains two distinct contracts of insurance. In the one on which the claim in this

case is made the company agreed to indemnify the plaintiff against all loss arising from any accidental damage to or destruction of his stone mill and warehouse, machinery and stock, stable and other outbuildings located at No. — Ridge avenue, Manayunk, Philadelphia, "excepting only damage or destruction by fire or lightning." The insurance was for one year from June 22, 1895. On February 6, 1896, "by reason of a sudden rise of the water in the Schuylkill river," certain property in the buildings mentioned, consisting of machinery, stock, etc., was damaged, destroyed, or carried away by the waters which came in and upon the buildings. The plaintiff in his statement of claim specified the items of damage and the amount thereof.

The company in its affidavit of defense disclaimed liability for the loss, alleging as grounds for the disclaimer that it did not arise from accidental damage to or destruction of the buildings, machinery, stock, etc., and that the plaintiff did not state in his application for insurance that the property insured was on the bank of the Schuylkill river. The company also averred in its affidavit of defense that the amount claimed in the plaintiff's statement was an overestimate of his loss, and that there should be deducted from it the sum of two thousand one hundred and seventy-six dollars and twenty-one cents. The plaintiff agreed to the deduction claimed, and the court, having made it, entered judgment for the balance. If there was no misrepresentation or concealment which vitiated the contract, and the language of the latter fairly includes and imposes a liability for the loss caused by the flood or freshet, the judgment should be sustained. The defendant company's main contention is, that damage to or destruction of property by a flood is not accidental ²²⁴ damage or destruction within the meaning of its contract. This leads us to consider what an accident is. The definitions of an accident as given in the Century Dictionary are, among others, as follows: "1. In general, anything that happens, or begins to be without design, or as an unforeseen event; 2. Specifically, an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap." In Bouvier's Law Dictionary, accident is defined as "an event which, under the circumstances, is unusual and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency." In Anderson's Law Dictionary, the following definitions of accident are given, with citation of authorities: "An event or occurrence which happens unexpectedly from uncontrollable operations of nature alone, and without

human agency; or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. An event from an unknown cause or an unusual or unexpected event from a known cause; chance, casualty. A definition corresponding substantially with those quoted above may be derived from our own case of *North American etc. Ins. Co. v. Burroughs*, 69 Pa. St. 43; 8 Am. Rep. 212. The principle of that decision is, that an accident is an unusual or unexpected result attending the operation or performance of a usual or necessary act or event. To the same effect is *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205. Further reference to the authorities which define an accident is unnecessary. It must be and is admitted by the defendant company that accidental damage to or destruction of property is the result of an accident. It may be the consequence of a tornado, a flood, or a thunderbolt. These, as causes of the damage or destruction, may be considered as in the same category. The destruction of a building by flood or freshet is as clearly accidental as the destruction of it by lightning. If damage to or destruction of the property by lightning was not regarded by the defendant company as accidental damage or destruction within the meaning of its contract, it would not have excepted from the same "damage or destruction by lightning." The exception of one from a number of like causes of damage to or destruction of property was a recognition by the insurer of its liability for loss arising ²²⁵ from other causes of the same nature. The fact that there had been floods in the Schuylkill before the occurrence of the one in question cannot affect the construction of the contract or the liability of the defendant company under it.

The company is presumed to know that which is obvious in regard to the property insured, including the natural perils to which it is exposed: *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703; *Louck v. Orient Ins. Co.*, 176 Pa. St. 638. In the absence of express stipulation, and where no inquiry is made, a failure to state facts known to the insurer or his agent or which he ought to know is no concealment. The insurers are presumed to be skilled in their business and to know those general facts which are open to the public and may be known to all who are interested to inquire: *May on Insurance*, sec. 207. *Armenia Fire Ins. Co. v. Paul*, 91 Pa. St. 520, 36 Am. Rep. 676, and *Dwelling House Ins. Co. v. Hoffman*, 125 Pa. St. 626, are to the same effect. In the case in hand, there was no concealment or misrepresentation by the assured. The hazards affecting liability to the public related to another branch of the

indemnity promised by the insurer, and obviously had no connection with the contract in question. Our conclusion is, that there was nothing in the affidavit of defense which constituted a complete or partial defense to the action, and that the judgment appealed from was properly entered.

Judgment affirmed.

ACCIDENT—WHAT IS.—An accident is an event that takes place without one's foresight or expectation, an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected: Monographic note to Paul v. Travelers' Ins. Co., 8 Am. St. Rep. 763.

INSURANCE—CONCEALMENT—WHAT IS.—Concealment, according to the law of insurance, is a designed and intentional withholding of any fact material to the risk, which the assured ought, in honesty and good faith, to communicate: Clark v. Union Mut. Fire Ins. Co., 40 N. H. 333; 77 Am. Dec. 721. But the insured is not expected to go into details about which the insurer manifests no interest and makes no inquiry: Bebee v. Fire Ins. Co., 25 Conn. 51; 65 Am. Dec. 553, and note. See, also, Hall v. Niagara Fire Ins. Co., 93 Mich. 184; 32 Am. St. Rep. 497; note to Queen Ins. Co. v. Young, 11 Am. St. Rep. 58; Dooly v. Hanover Fire Ins. Co., 16 Wash. 155; 58 Am. St. Rep. 26.

INSURANCE—ACCIDENT—CONSTRUCTION OF POLICY.—The terms of an accident insurance policy should be liberally interpreted in favor of the assured: McGlinchey v. Fidelity etc. Co., 80 Me. 251; 6 Am. St. Rep. 190. If a stipulation or exception in a policy of insurance is capable of two meanings, that must be adopted which is most favorable to the assured: Utter v. Travelers' Ins. Co., 65 Mich. 545; 8 Am. St. Rep. 913.

INSURANCE—KNOWLEDGE OF INSURER—PRESUMPTIONS. An insurance company when it issues a policy is presumed to know the corporate powers of the insured, the nature of its business, and the usual and customary methods of conducting the business pertaining to the insured property: Western etc. Pipe Lines v. Home Ins. Co., 145 Pa. St. 846; 27 Am. St. Rep. 703, and note; Faust v. American Fire Ins. Co., 91 Wis. 158; 51 Am. St. Rep. 876, and note.

PHOENIX BREWING COMPANY v. RUMBARGER.

[181 PENNSYLVANIA STATE, 251.]

SURETYSHIP—DISCHARGE.—TAKING NOTES payable at a future day for an existing debt does not of itself imply an agreement to wait until the notes mature, nor discharge the parties secondarily liable for the payment of the debt as sureties or guarantors.

SURETYSHIP—WHAT RELEASES FROM LIABILITY.—Any act of the creditor which prevents the surety from insisting on the fulfillment of the contract as originally made, or which entitles the principal debtor to delay, is a ground of defense in an action against the surety, but, to exonerate the surety, it must appear that the original obligation was changed by a binding agreement, and the new contract must be such as would be a valid defense by the principal debtor to an action on the original agreement.

SURETYSHIP—WHAT DOES NOT EXONERATE SURETY. If a bond with sureties is given to secure the payment of the amount of sales to be made in future by the creditor for an indefinite period of time in a continuing business, and, after payments on account from time to time, but without any agreement as to the balance due,

the principal debtor, of his own motion, gives the creditor a judgment note at six months for the amount appearing from his books to be due, the receipt of which is not acknowledged nor credited on the creditor's books, who, after a demand that the whole account be paid, extends credit for three months at the request of the debtor until the note is due, and then enters judgment thereon and issues execution, there is no such satisfaction of the original debt, or a giving of time to the principal debtor, as varies the original contract, or exonerates the sureties on the bond from liability.

SURETYSHIP—CONSTRUCTION OF STATUTE.—The failure of a creditor to brand barrels or casks in which liquors are sold, as commanded by a statute providing a penalty for failure to do so, but not prohibiting the prosecution of business when its provisions are not complied with, is no defense to sureties on a bond given to secure the payment of the purchase price of such liquors.

Action against the principal debtor and his sureties on a bond given to secure payment of the purchase price of liquors to be sold and delivered. Judgment for plaintiff. Defendants appealed.

A. L. Cole, W. C. Pentz, and H. A. Moore, for the appellants.

F. Fielding, for the appellee.

²⁵⁶ FELL, J. The facts established by the evidence furnish no ground for the application of the theories on which the defense was based, even if it were conceded as argued by the appellants that the taking of a note payable at a future day for an existing debt implies prima facie an agreement to wait until the note matures, and discharges the parties secondarily liable for the payment of ²⁵⁷ the debt as sureties or guarantors, a proposition by no means in accord with our cases: See *Shaw v. First Reformed etc. Church*, 39 Pa. St. 226; *Hutchinson v. Woodwell*, 107 Pa. St. 510; *Buck v. Wilson*, 113 Pa. St. 423. The right of the principal to postpone the fulfillment of the contract is at variance with that of the surety to demand its punctual performance or to perform it himself and sue for indemnity; and, generally, any act of the creditor which prevents the surety from insisting on the fulfillment of the contract as originally made, or which entitles the principal debtor to delay, is a ground of defense in an action against the surety. But, in order to exonerate the surety, it must appear that the original obligation was changed by a binding agreement, and the new contract must be such as would be a valid defense by the principal debtor to an action on the original agreement: Notes to *Rees v. Berrington*, 2 Lead. Cas. Eq. 1906; *United States v. Howell*, 2 Am. Lead. Cas. 472; 4 Wash. C. C. 620.

The bond on which the action was founded was not for the payment of any amount at a fixed time. It was of the nature of a bond of indemnity, and the condition was that Rumbarger, the principal in the bond, should pay all accounts for beer and liquors

purchased by him of the plaintiff in pursuance of a contract made and a course of dealing established, "when and as often as the same may fall due, or when thereunto legally required." Nothing was due when the bond was given. It had reference to future dealings only, and its delivery was a condition precedent to the opening of the account. No contract as to the time within which payments were to be made was afterward entered into, and none can be implied from the course of dealing between the parties. Beer was purchased every few days, and payments on account appear to have been made from time to time and without any fixed rule. The balance due steadily increased, and at the end of fourteen months it amounted to seventeen hundred dollars. Without an agreement between the parties as to the amount due on the open account, Rumbarger, without any request and wholly of his own motion, sent two judgment notes, one at three and one at six months, to the plaintiff, for the balance that appeared from his books to be due. The receipt of these notes was not acknowledged by the plaintiff, they were not credited on its books, and at the end of three months payment of the whole account was demanded; but at the request ²⁵⁸ of Rumbarger the plaintiff waited until the maturity of the second note, when judgment was entered on it and execution issued.

As the bond was given to cover the amount of sales which might be made for an indefinite period in a continuing business, it must be presumed, in the absence of any stipulation on the subject, that it was contemplated by all the parties that there would be an allowance of the usual credits. But it is unnecessary to resort to presumptions, as by the terms of the bond there could be no default except by the failure of the principal to pay when due according to an express or implied agreement between him and the plaintiff. The allowance of credits usual under the custom of the business would not have varied the contract, and, in the absence of all testimony on the subject, the court could not assume that the allowance of three or six months was unusual or unreasonable. The notes were not given or accepted for a balance ascertained after all business arrangements between the parties had ended, which was then due and demandable. It is true that there were no sales after the dates of the notes, but when they were sent it was the expectation of the plaintiff, based on the representations of Rumbarger, that the business would continue. It cannot, therefore, be said that there was a satisfaction or merger of the original debt, or a giving of time to the principal debtor which varied the contract and exonerated the sureties.

The objection that there was no affirmative proof by the plain-

tiff that it had complied with the second section of the act of April 14, 1863 (Pub. Laws, 389), requiring the branding of barrels and casks in which liquors are sold and the giving of a certificate to the purchaser, is without force. The act does not prohibit the prosecution of the business when its provisions are not complied with, but provides a separate penalty for a failure to observe them. The burden of proof, if any defense could have been based on the act, was with the defendants: *Horan v. Weiler*, 41 Pa. St. 470.

The judgment is affirmed.

SURETYSHIP—WHAT RELEASES SURETY FROM LIABILITY.—When a creditor enters into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety: *Scott v. Fisher*, 110 N. C. 311; 28 Am. St. Rep. 688, and extended note. An agreement extending the time of payment made by the principal debtor with the holder of a note must, in order to release the surety be such an agreement as the principal debtor may enforce: *McDougall v. Walling*, 15 Wash. 78; 53 Am. St. Rep. 871, and extended note. See *Benson v. Phipps*, 87 Tex. 578; 47 Am. St. Rep. 128, and note; *Carver v. Steele*, 116 Cal. 116; 58 Am. St. Rep. 156, and note. A contract for an extension of time in which to pay a promissory note, void for want of consideration, will not release the surety thereon: *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565, and note.

GUNSTER v. SCRANTON ILLUMINATING HEAT AND POWER COMPANY.

[181 PENNSYLVANIA STATE, 827.]

BANKS AND BANKING—CHECKS—SIGNATURE.—The signature of the depositor is the essential feature of a check, and a bank is not bound to pay any attention to the handwriting of the other parts, unless it shows something to excite suspicion.

AGENCY—NOTICE.—An exception to the general rule that notice to the agent is notice to the principal arises in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as when he acts for himself in his own interest and adversely to that of his principal.

AGENCY—NOTICE—FRAUD.—If an agent representing two principals concocts a scheme to defraud one of them for the benefit of the other, it is to be presumed that he did not disclose to the principal he intended to cheat the means by which he sought to effect his purpose.

AGENCY.—NOTICE TO AN AGENT is not to be deemed notice to his principal when the communication of the facts would necessarily prevent the consummation of a fraudulent scheme which the agent is engaged in against such principal.

AGENCY—FRAUD.—An independent fraud committed by an agent on his own account is beyond the scope of his employment, and bears analogy to a tort committed willfully by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master.

AGENCY—FRAUD—NOTICE.—If the treasurer of a corporation, who is also vice-president of a bank, makes two notes in the name of the corporation, followed by his own name as treasurer, after which the notes are discounted by the bank, and the corporation given credit for the proceeds, and on the same day the treasurer draws a check "to the order of Dft. N. Y.," signing it in the name of the corporation, followed by his name as treasurer, and this check is charged to the corporation upon the books of the bank, and such treasurer then draws two drafts on New York to his own order in payment of such check, signing them with his own name as vice-president of the bank, and, after receiving the proceeds of such drafts, uses them for his own private purposes, the facts are sufficient to authorize a judgment that as the notes were made by the treasurer of the corporation as such, and as the check was drawn for the proceeds by such treasurer as such, and as both acts were within his authority, the corporation was liable for the loss, and that the bank was entitled to recover upon the notes.

Assumpsit upon two promissory notes. The following facts appear from the report of the referee: "1. The Scranton City Bank is a corporation organized under the laws of Pennsylvania; 2. On the thirteenth day of May, 1889, and for some time prior thereto, George A. Jessup was vice-president of the said bank, and had the principal management of its affairs. Among other things he attended to the drawing of checks. 3. Prior to the twelfth day of March, 1889, and from that time until after the thirteenth day of May, 1889, the said George A. Jessup was also treasurer of the said defendant company. 4. On the twelfth day of March, 1889, the defendant company made its promissory note to the Scranton City Bank in the sum of four thousand dollars, signed Scranton Illuminating, Heat and Power Co., George A. Jessup, Tr. 5. On the thirteenth day of May, 1889, the defendant company made another note to the Scranton City Bank in the sum of five thousand dollars, signed Scranton Illuminating, Heat and Power Co., Geo. A. Jessup, Tr. 6. The said Scranton City Bank, on the days of the respective dates of said promissory notes, discounted the same, and gave the defendant company credit for the proceeds. 7. In May, 1889, the defendant company kept its bank account at the said Scranton City Bank. The method usually employed by the defendant company to draw its money out of said bank was as follows: The secretary and book-keeper of the defendant, Mr. Fred C. Hand, wrote checks upon the blanks contained in blank check-book, and made memoranda of each check on the corresponding stub in said book. The checks were then presented by Mr. Hand to the said George A. Jessup, treasurer, for his signature. But it appears that said Jessup, as treasurer of the defendant, drew at least seven checks upon said bank upon loose blanks not taken from said check-book, and that in one of them he was the payee. These checks were paid, and no objection was made to their payment, except in the

case of the check mentioned in the next finding. 8. On the thirteenth day of May, 1889, the same day on which the said promissory note for five thousand dollars was made and discounted as aforesaid, the said George A. Jessup, as treasurer of the company defendant, drew a check upon a loose blank not taken from the check-book of the defendant, for the sum of six thousand dollars. The following is a copy thereof:

“Scranton, Pa., May 13, 1889.

“Scranton City Bank of Scranton.

“Pay to the order of Dft., N. Y., six thousand dollars.

(Signed) “SCRANTON ILLUMINATING, HEAT & POWER CO.,

“\$6,000.

GEO. A. JESSUP, Tr.’

“The amount of this check was charged to the defendant upon the books of the bank. Upon the same day, the said Jessup, as vice-president of the Scranton City Bank, in payment of said check drew two drafts on the Third National Bank of New York, one for four thousand dollars, and one for two thousand dollars, both payable to George A. Jessup. Copies of said two drafts are as follows:

“Scranton City Bank.

No. 11,550.

“Scranton, Pa., May 13, 1889.

“Pay to the order of George A. Jessup \$4,000 (four thousand dollars).

GEO. A. JESSUP,

“Vice-President.

“To Third National Bank, New York.

“Indorsed: Geo. A. Jessup.’

“Scranton City Bank.

No. 11,551.

“Scranton, Pa., May 13, 1889.

“Pay to the order of Geo. A. Jessup \$2,000 (two thousand dollars).

GEO. A. JESSUP,

“Vice-President.

“To Third National Bank, New York.

“Indorsed: Geo. A. Jessup.’

“George A. Jessup went forthwith to New York and received payment of said drafts in currency, and used the proceeds for his own private purposes. 9. The said George A. Jessup drew said check and said drafts, not for the use and benefit of the defendant company, but for his own private use. The whole transaction was unauthorized, and was a fraud upon the defendant, committed by George A. Jessup. 10. As treasurer of the company defendant, the said Jessup had made other promissory notes, and had procured the same to be discounted by the said

bank. 11. The said Scranton City Bank, having become insolvent on the twenty-fifth day of May, 1889, made an assignment for the benefit of its creditors to Joseph H. Gunster, the plaintiff, who took possession of its property and assets, including the two promissory notes aforesaid, on the twenty-seventh day of the same month. 12. No director, officer, or employé of the defendant company had any knowledge of the drawing of said check for six thousand dollars until fully two weeks after the same had been drawn. This was after the Scranton City Bank had made the assignment aforesaid and after its assets had passed into the hands of the assignee. Of course, no objection had been made, prior to such knowledge, to the payment of said check. 13. The said George A. Jessup did not give the cashier, president, or any officer or director of the said bank, notice of any fact affecting the validity of said promissory notes, checks, or drafts. 14. The Scranton City Bank never had notice from the defendant company as to the form in which checks were to be drawn by said company, nor was any objection made to the manner in which checks and notes were drawn by said Jessup as treasurer of the defendant, until after the assignment aforesaid, and then only to the said check for six thousand dollars."

"CONCLUSIONS OF LAW.

"1. The knowledge of George A. Jessup that he had no authority to draw the said check for six thousand dollars, and that he was committing a fraud upon the defendant, must be imputed to the Scranton City Bank for the reason that in the payment of the check he, and no one else, acted for the bank. 2. The amount of said check was improperly charged to the defendant on the books of the bank. The accounts between the parties, with the exception of the notes in suit, having been adjusted without correcting such improper charge, such correction having been asked but refused, the defendant is entitled to have the same set off against the plaintiff's demand. 3. J. H. Gunster, the plaintiff in this case, being an assignee for the benefit of creditors, stands on no higher ground than the assignor, the Scranton City Bank. 4. The plaintiff is entitled to judgment for one hundred and twenty dollars and seventy-nine cents, with interest from April 8, 1895. The court dismissed exceptions to the report of the referee."

C. H. Welles, S. B. Price, and E. Merrifield, for the appellant.
F. Warren and H. A. Knapp, for the appellee.

334 MITCHELL, J. The referee found that there was nothing in the transaction so far out of the ordinary course of busi-

ness as to make it unusual or such as should excite suspicion had the bank been acting through any of its officers except Jessup. Jessup was the treasurer of the defendant company, and the person who made its promissory notes, had them discounted for it, and drew its checks. These were usually, but not always, taken from its regular check-book, and the body of them was usually in the handwriting of the secretary and bookkeeper, though signed by Jessup. The signature of the depositor is the essential feature of a check, and a bank is not bound to pay any attention to the handwriting of the other parts, unless it shows something to excite suspicion. Nor was there anything to put the bank upon inquiry in the fact that the drafts were drawn to Jessup's own order. The check in payment of which the drafts were issued was drawn "to the order of Dft. N. Y.," and there was nothing on the face of the transaction to indicate that it was not for the regular and legitimate business of the defendant company.

The referee finding that if Jessup had not been an officer of the bank there would have been no valid defense thus reduced the case to a question of law whether Jessup's knowledge of his own fraud, at the time of its perpetration, carried with it knowledge or notice to the bank which would prevent its availing itself of a credit on the check. He took the affirmative view, and the court below sustained him.

³³⁵ The authorities on this question are not uniform. In the case most relied upon by the learned referee, *First Nat. Bank v. New Milford*, 36 Conn. 93, the cashier of the bank was also treasurer of the town, and in the latter capacity had been accustomed to borrow money for the town upon notes made by him in its name. Having in his capacity as cashier embezzled the funds of the bank, he drew a note for three thousand dollars, as treasurer of the town, entered it upon the books of the bank as if regularly discounted, and thus covered his embezzlement. In a suit on the note it was held that the bank could not recover. The decision is put upon two grounds, first, that the treasurer did not intend to pledge the credit of the town, but that "he drew the note, entered it in the books, and caused it to be filed by the clerk, as a false representation and cover, precisely as he made other false representations and false entries, intending to restore the money and take out the note, and not intending to onerate the town. If that is so, there was no meeting of minds and no purchase of the note or contract of loan which will sustain this action." This was apparently the view of the majority of the court, but the opinion then goes on to add as a second reason that even if there was a contract of loan "it was made by Conklin as agent of the

town with Conklin as agent of the bank. . . . He, as agent of the bank, had full knowledge therefore of the fraud, and now the bank if they ratify his contract and confirm his agency, must accept his knowledge and be bound by it, precisely as if the loan had been made and the knowledge had by the board of directors." The first ground thus set forth does not appear to have been adopted in any other case, but the second has very respectable authorities in its favor, among which may be cited *First Nat. Bank v. Dunbar*, 118 Ill. 625; *Farmers' etc. Bank v. Kimball Milling Co.*, 1 S. Dak. 388; 36 Am. St. Rep. 739; and similar in principle, *Bank of United States v. Davis*, 2 Hill, 451; *Holden v. New York etc. Bank*, 72 N. Y. 286; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396; 32 Am. Rep. 479.

On the other hand, the principle has been distinctly repudiated by several courts of equal authority, and in the latest text-book it is laid down without qualification that an exception to the general rule that notice to the agent is notice to the principal "arises in case of such conduct by the agent as raises a ³³⁶ clear presumption that he would not communicate the fact in controversy, as where the agent acts for himself in his own interest and adversely to that of the principal": 1 Am. & Eng. Ency. of Law, 2d ed., 1145, and cases there cited.

In *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262, it was held, after a review of the cases, that a director offering a note of which he is the owner to the bank of which he is a director, for discount, is to be regarded as a stranger, and the bank is not chargeable with the director's knowledge of fraud or want of consideration for the note. And in *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158, it was held that where the same person is an officer of two corporations, and he transfers securities issued by one to the other, with knowledge that they are not valid except in the hands of an innocent holder for value, his knowledge is not to be attributed to the transferee, Van Fleet, V. C., saying, "I understand the law to be that where an agent representing two principals concocts a scheme to defraud one of them for the benefit of the other, it will be presumed that he did not disclose to the principal he intended to cheat, the means by which he intended to effect his purpose."

In *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, the exception was held to be well established that notice to the agent would not be deemed notice to the principal where the communication of the facts would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in, and the distinction sometimes made upon the actual

presence of the agent, as e. g. a bank director at the meeting where the transaction was concluded was said not to be of importance. The same view was followed in *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185, and *Corcoran v. Snow Cattle Co.*, 151 Mass. 74. See, also, to the same effect, *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *Winchester v. Baltimore etc. R. R. Co.*, 4 Md. 231; *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736; *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243, 252; *Davis etc. Wheel Co. v. Davis etc. Wagon Co.*, 20 Fed. Rep. 699; *Thompson-Houston etc. Co. v. Capitol etc. Co.*, 65 Fed. Rep. 341. And in *Platt v. Birmingham Axle Co.*, 41 Conn. 255, it was held that the knowledge of the secretary of a prior assignment of stock, standing in his wife's name, could not be imputed to the corporation, to defeat the corporation's lien for subsequent advances to ²³⁷ the wife upon the same stock, and the decision does not seem to have been thought in conflict with *First Nat. Bank v. New Milford*, 36 Conn. 93, as no comment or reference was made to that case.

An instructive case is *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 273, 9 Am. St. Rep. 698. The same person was treasurer of two corporations, and fraudulently drew checks upon each in favor of the other when needed to balance his accounts and make his cash appear correct on examination. There had been also bona fide loans from each to the other, made in the same way. The court held that the account between them should be stated by charging each with the amount wrongfully transferred to it from the other, so that each should lose the exact amount taken from it by its treasurer acting in his capacity as such. This case was regarded by the learned referee in the court below as belonging to the class which imputes notice to the principal from knowledge of the agent, and the judgment could have been reached on that view. But the decision is put explicitly on the ground that "a party, even though innocent, cannot avail himself of an advantage obtained by the fraud of another unless there is some consideration moving from himself," referring to authorities as early as Lord Mansfield, and citing among others, *Loring v. Brodie*, 134 Mass. 453, 468. It is to be noted that this case, though leading to a different judgment, was not regarded in the subsequent decisions in 139, 150, and 151 Massachusetts, cited *supra*, as conflicting with them, and that the principle of it would result in the same judgment, though for a different reason, as that in *First Nat. Bank v. New Milford*, 36 Conn. 93, and reconcile that case not only with the later case in the same court, *Platt v. Birmingham Axle Co.*, 41 Conn. 255, but with the cases in the

class we are now considering. And the same principle would sustain *First Nat. Bank v. Dunbar*, 118 Ill. 625, and probably other cases in the class imputing notice to the principal from knowledge by the agent.

We are of opinion that the second class of cases have not only the preponderance of authority but of sounder reason. The rule that knowledge or notice on the part of the agent is to be treated as notice to the principal is founded on the duty of the agent to communicate all material information to his principal, and the presumption that he has done so. But legal presumptions ought to be logical inferences from the natural³³⁸ and usual conduct of men under the circumstances. But no agent who is acting in his own antagonistic interest or who is about to commit a fraud by which his principal will be affected does in fact inform the latter, and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature. If it be urged, as in some cases, that the principal having put the agent in his place should, as a matter of public policy, be held answerable for all the latter does, a sound answer is suggested by the court in *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 206, 15 Am. St. Rep. 185, that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and bears analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master.

We have not found or been referred to any express authorities in our own state. The point was touched upon in *Millward-Cliff Cracker Co's Estate*, 161 Pa. St. 157, 167, and some observations of the learned auditor in that case seemed to be based on *First Nat. Bank v. New Milford*, 36 Conn. 93, and the line of decisions following it. But the facts show that the bank was endeavoring to retain an advantage and assert a claim founded on a fraud in which its own officer had participated, and the case therefore comes plainly within the rule adopted in *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 273, 9 Am. St. Rep. 698, which we think entirely sound. In *Wilson v. Second Nat. Bank* (Pa., Nov. 15, 1886), 7 Atl. Rep. 145, it was said per curiam, "the knowledge of Willcock as treasurer of the tool company cannot be imputed to the bank of which he was cashier, unless he revealed that knowledge to some one or more of its officers." The decision does not rest directly on that ground, but the expression shows that the views of the court were in harmony with those we now express. Even, therefore, if the present case be made to turn on the question of knowledge it was erroneously decided.

But we do not regard knowledge as the pivotal point of the case. Upon that point both parties would stand equal. Both might by mere inference be charged with knowledge, as the fraud was committed by an agent with authority to act for both, but in fact neither had or in the nature of things could have any knowledge at all, and neither was under any obligation to presume that its agent would be guilty of fraud. The real ³³⁹ question is, In what capacity did Jessup commit the fraud? And it is clear that it was as treasurer of the appellee. It was as treasurer he presented the notes for discount, and as treasurer he drew the checks for the proceeds. Both acts were within his authority as treasurer, and would have been lawful if they had been honest, but he drew the money on drafts which were the property of the company, and when he embezzled the money it was the money of the company. The bank had no part in his act, and gained nothing by it. The fraud had its inception and its consummation in acts done in his capacity of treasurer of the defendant company, and it should bear the loss.

Judgment reversed, and record remitted with directions to enter judgment for the plaintiff, for the full amount of his claim.

BANKS AND BANKING—CHECKS—SIGNATURE.—A bank is bound to know the signature of its depositors: *First Nat. Bank v. Allen*, 100 Ala. 476; 46 Am. St. Rep. 80, and note; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 293; 43 Am. St. Rep. 247, and note. But it is not bound to know the handwriting in the body of an instrument: *Monographic note to People's Bank v. Franklin Bank*, 17 Am. St. Rep. 896.

AGENCY—NOTICE TO AGENT—WHEN NOTICE TO PRINCIPAL.—The rule that notice acquired by an agent while transacting the business of his principal is notice to the latter applies as well to banking and other corporations as to individuals, but, when the agent acts for himself and not for his principal, the rule does not apply: *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519; 35 Am. St. Rep. 770, and note; nor does it apply where the agent was acting for another principal, unless it first be shown that such knowledge was present in the mind of the agent at the very time of the transaction now in question: *Constant v. University of Rochester*, 111 N. Y. 604; 7 Am. St. Rep. 769, and note; nor where the agent is engaged in the commission of an independent fraudulent act on his own account and the facts to be imputed relate to this fraudulent act: *Allen v. South Boston R. R. Co.*, 150 Mass. 200; 15 Am. St. Rep. 185, and note.

AGENCY—PRINCIPAL—WHEN LIABLE FOR AGENT'S FRAUD.—The principal is liable for his agent's fraud, tort, or negligence, though committed without the principal's participation or consent, if it is done in the course of his employment, and is not a willful departure from it: *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416, and note. As to third persons affected by the agent's acts or words, it is the apparent scope of his authority and not his actual instructions that must govern: *Griswold v. Gebble*, 126 Pa. St. 353; 12 Am. St. Rep. 878, and note; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652; 51 Am. St. Rep. 727, and note.

FREEMAN'S ESTATE.

[181 PENNSYLVANIA STATE, 405.]

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTE—DUE PROCESS OF LAW.—The Pennsylvania statute of April 18, 1853, section 2, authorizing the court to decree a sale when property is held in trust, and one or more persons required to consent unreasonably withhold consent, is not unconstitutional as taking property without due process of law. It does not defeat or interfere with the individual rights of property different from or further than any other mode of changing the rights of joint owners to severalty or regulating the management until that is done.

TRUSTS—POWER TO SELL PROPERTY.—Power conferred upon a court by statute to decree a sale of property held in trust, when one or more persons required to consent unreasonably withhold consent, is properly exercised in a case of a lease of such property for a long term, which the trustees, empowered to lease without the consent of the cestuis que trust, treat as a sale for the purposes of the trust requiring the consent of such cestuis que trust to a sale of the trust property.

TRUSTS—POWER TO SELL PROPERTY.—Power conferred by statute upon a court to decree a sale, when property is held in trust and one or more persons required to consent unreasonably withhold consent, extends to a lease which is properly treated as a sale, and will double the net revenue of the property at once, with an increase in the future, and increase the value of the property by reason of improvements which the lessee is required to make.

Petition to lease real estate. H. G. Freeman left a will by which he devised to the Girard Life Insurance Annuity and Trust Company certain real estate to hold upon certain trusts; namely, to make sales of all or any part of such real estate at its discretion for the benefit of his estate, provided that no sale of any part of such real estate should be made without the consent in writing of the several cestuis que trust having any interest therein, and who at the time should be of lawful age and accessible; and further to make leases from time to time of such real estate; to collect, demand, and receive the rents, income, and proceeds thereof. On January 12, 1895, J. B. Freeman, one of the parties in interest, presented to the orphans' court a petition praying that the trustee might have leave to advertise for proposals to lease the trust property, upon an improvement lease, for a term not to exceed fifty years, the proposers to submit plans of the character of buildings to be erected, the amount of rent to be paid, the shortest term for which they would lease the property, etc. The proposed lease was objected to by parties representing a one-sixth interest in the property. The court made a decree authorizing the trustee to execute such lease, and the objectors appealed.

H. B. Freeman and I. N. Brown, for the appellants.

G. T. Bispham, S. Bainton, G. P. Rich, H. C. Boyer, P. R. Freeman, and J. E. Carpenter, for the appellees.

407 MITCHELL, J. The proposed lease is within the words of the testator's grant of power to the trustee to lease the property from time to time at its own discretion, but, considering the length of the proposed term in relation to the probabilities of life of the testator's children now living, the trustee and the court below preferred to treat the lease as practically amounting to a sale, and therefore coming within the testator's restriction requiring the consent of all the cestuis que trustent of age and accessible. In so doing the trustee and the court displayed commendable regard for the equitable rights of the heirs, as well as for the security of the title to be passed to the lessee. No reasonable objection can be made to such action.

408 Treating the lease on the basis of a sale, the testamentary power of the trustee cannot be exercised for want of the unanimous consent of the heirs which the will required as a condition precedent, and resort was therefore had to the orphans' court under the act of April 18, 1853 (Pub. Laws, 503). The case falls within the express words of section 2 authorizing the court to decree a sale where property is held in trust and "one or more persons required to consent . . . unreasonably withhold consent."

The constitutional objections to this statute raised by the appellants are not tenable. As applied to the case, the statute is not the divesting of estates of parties sui juris without their consent, but the regulation of joint rights where the joint owners cannot agree in the control and disposition of the property. It defeats or interferes with the individual rights of property no differently and no further than any other mode of changing their rights to severalty or regulating the management until that is done. The right of a joint owner is to an undivided interest in every portion of the joint property, but this right is accompanied with the ancient incident of partition. Each owner has the right to enlarge his estate to severalty, though in so doing he must reduce its corpus so that the other owners may also have the like privilege. The mode of doing this has always been within legislative control, and this statute does no more. There is no question even of retroactive application of the law, as the act was in force for more than twenty years before the death of the testator, who, as an experienced member of the Philadelphia bar, must be assumed to have written his will with the knowledge that the powers of leasing and sale which he gave his trustee could be supplemented, if occasion arose, by the powers of the orphans' court.

The further argument that the testator only intended short leases, or at most those of ordinary length, would have much force if the trustee were acting on his own discretion under the

testamentary authority to lease from time to time, but, as already said, the trustee and the court have treated the case as practically involving a sale, and, if the requisite steps for a valid sale have been taken, they must certainly include the lesser act of leasing even for so long a term as fifty years. Such leasing does not contravene any express direction of the testator, but only supplements the authority he gave by a resort to the power ⁴⁰⁹ of the court to meet circumstances not anticipated and therefore not provided for by him.

The only remaining question whether the court was right in deciding that the consent of appellants was unreasonably withheld cannot be seriously contested. The main value of the property is in the land. The buildings are only a survival of the private residences to which the neighborhood was originally devoted, temporarily adapted for business, but falling far short of the kind of improvement that the present uses of the neighborhood demand. The rental of the property in its present condition is an inadequate percentage on its assessed value for taxation, and the latter is constantly increasing. It is admitted that the proposed lease will at once double the net revenue from the property, with an increase in the future, in actual amount as well as in indemnity against the increase in taxation; and the property will revert at the end of the term, improved by the erection of a building adapted to its most modern needs, at a cost, entirely defrayed by the lessee, of more than one-half the amount of the highest present valuation of the whole property. This plan has the active support of the owners of five-sixths of the property, and has been approved by the judgment of the trustee and the court below. The decree is framed with great care to secure every possible interest of the cestuis que trustent, and we are of opinion that it was not only within the jurisdiction of the court, but also that the power was properly exercised.

Decree affirmed.

MR. CHIEF JUSTICE STERRETT and Mr. Justice Williams dissented, and Sterrett, C. J., delivered the following opinion:

"As to the absolute want of authority under the will itself, without compliance with its provisions, there cannot be any question. The cardinal rule of construction which inheres in every grant of power is but a synonym of the rule that a trustee shall do only those acts, in the course of administration, which are essential to effectuate the purpose of his trust. The reason of the rule lies in the presumption of intent derived from the language used. It has accordingly been uniformly held that a trustee of real estate may make repairs, because necessary to prevent decay; but he may not make betterments without general or special authority. Thus, in *Green v.*

Winter, 1 Johns. Ch. 27, 7 Am. Dec. 475, where the trustee's power was to sell land for the payment of encumbrances, Chancellor Kent said: "To tolerate such wide deviation from the nature and terms of the trust would be creating a dangerous precedent. It would be placing trust property in the greatest jeopardy, and perhaps encumber it with burdens too grievous to be borne. I cannot therefore admit of any allowance under this head but such as may justly be considered reasonable reparations or repairs. . . . It is the established doctrine that a trustee can only be allowed for necessary expenditures; and the cestui que trust has always his option to take or refuse the benefits or loss of the unauthorized act of his trustee." In *Wykoff v. Wykoff*, 8 Watts & S. 481, credit for improvement was refused because unnecessary, and because such allowance would afford an opportunity to "improve" the cestui que trust out of his land. Numerous authorities to the same effect might be cited, among which are *Bellinger v. Shafer*, 2 Sand. Ch. 293; *Dickinson v. Conniff*, 65 Ala. 581; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Field v. Wilbur*, 49 Vt. 157; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34.

That being the established principle, the question is whether the improvement contemplated here is such as, considering the nature of the trust, the quantity of the estates and the character of the property, was needful to be made and ought to have the sanction of a court of equity. Certainly, there is nothing in the nature of the trust itself which would justify it. No one will pretend that tenants for life, in whom are united the legal and equitable estate, can compel each other or those in remainder to unite in such improvements: *Tiedeman on Real Property*, secs. 67, 68. Even a tenant in common in fee cannot compel his fellow to make more than necessary repairs: *Kelsey's Appeal*, 113 Pa. St. 119; 57 Am. Rep. 444; much less can tenants for life. The mere separation of legal from equitable life estates can have no effect in changing the relative rights of those in remainder. The incidents of these respective estates remain the same. It is claimed, however, that because the power to sell, given in this will, implied a power to mortgage, it also implied a power to make an improvement lease for fifty years, a term which will admittedly extend far beyond the lives of these life tenants, and probably beyond the lives of a majority of the remaindermen. But such implications arise only so far as consistent with the donor's purpose. Thus, where an absolute conversion is contemplated, as is clearly the fact in this case, power both to lease and mortgage is excluded: *Hill on Trustees*, 476; *Evans v. Jackson*, 8 Sim. 217; *Lewin on Trusts*, *425, *426, 563, 564. In any event, it is self-evident that partial execution must be in substantial harmony with and limited by the testator's purpose. It was an essential part of this purpose that, immediately on the death of the last cestui que vie, 'partition, allotment and division of his entire estate, real and personal,' shall be made as directed by him, and thereupon the duties of the trustee will necessarily cease. Assume the lease made on the theory of a partial execution, its tender by the trustee on account would surely not answer a remainderman's demand for his distributive share. No

rule is better settled than that a donee of the proceeds of sale may refuse to receive securities and insist upon cash; for cash is what the testator gives him and that to which he is entitled. If he must take the lease he is placed at great disadvantage in making disposition of his undivided interest. On the other hand, if the trustee sells subject to a lease which fixes the rental for a long period of years in advance, primarily for the benefit of the life tenants, those in remainder lose the chance of enhancement which is incidental to absolute estates. Surely, the simple scheme adopted by the testator—a trust for life to one class of beneficiaries, and 'partition, allotment, and division' to another class—never contemplated any such contingencies. Such lease is absolutely in excess of the power. When the time should arrive which the testator has fixed for partition and distribution there could be no subject for its support so far as these donees are concerned. If there be room for doubt as to the correctness of this view, it is removed by the direction which the testator gave in respect of the management of the trust for life. 'To lease from time to time' necessarily means at intervals during the term of the trust and excludes any longer term. The force of this is sought to be evaded by an implication drawn from the power given the trustee to anticipate, with the unanimous consent of the cestuis que vie, the time of partition and distribution. But this on analysis will be found rather to add strength to the view here taken. The purpose of that power was certainly not to change the quantity of the estates originally given. The destination of the corpus remained the same as before; and there is nothing to justify an inference of any intention to change the time or character of the final distribution as already fixed. In any event, the proceeds of sale must then be ready for distribution. If there is no change in this respect, the necessary implication is that this power was intended as an alternative provision relating to management pending life tenure. If leasing the real estate in the manner directed by the will in the first instance should prove unsatisfactory, then, with the unanimous consent of the cestuis que vie, the trustee might sell by way of anticipation and invest the proceeds until the time already fixed for final distribution. The testator, having specified these alternative modes, must be presumed to have intended the exclusion of any other. Iteration shows that he had no other idea of conversion before the termination of the trust than that of sale. The proposed lease, unlike a mortgage which produces cash, will be in no sense a partial execution of the power given here. It will not only not make one step toward the purpose of conversion, but will be plainly an actual hindrance. It is of a nature entirely inconsistent with the testator's scheme of conversion. It will not produce one dollar of cash answerable to final distribution, but contemplates the continuance of the estate in land long beyond the time fixed by the will. It will, therefore, be a palpable breach of trust and subversion of testator's declared purpose.

"But, conceding the want of testamentary power, it is insisted that the orphans' court has jurisdiction to grant relief under the

act of 1853. That is not an enlarging but an enabling statute. Its declared purpose was to 'unfetter' and make titles freely alienable. It enables parties who have vested rights to enjoy the benefit of them. It authorizes what, without restricted powers, the beneficial owners might themselves do. It makes no attempt to change relative rights of property, but, on the contrary, it expressly (sec. 2) provides that nothing contained in it shall be taken 'to affect or impair any right or powers, otherwise existing to sell, mortgage, or lease. Disability to discharge liens, bar contingent interests, make complete appointments, probate parol contracts, these and the like parties interested are enabled to remedy; but search is vain for power to enlarge one vested right at the expense of another: *Keller v. Lees*, 176 Pa. St. 402. Many acts have been passed authorizing sales which have been sustained on the ground of disability of parties interested; but interference with the constitutional right of parties sui juris to exercise the powers incident to ownership has been uniformly condemned: *Ervine's Appeal*, 16 Pa. St. 250; 55 Am. Dec. 499; *Kneass' Appeal*, 31 Pa. St. 87; *Palairot's Appeal*, 67 Pa. St. 483; 5 Am. Rep. 450. In the last case, Mr. Justice Sharpswood, discussing the legislative power to authorize conversion, said: 'But this power to authorize conversion has never been recognized as constitutional by this court except in the case of the property of persons under disabilities or where there were contingent interests whose owners had not come into existence, and that, too, with the consent of those standing in a fiduciary relation of trustee, guardian, or committee. The cases in which such conversion may be authorized seem well enumerated in Mr. Price's valuable act of April 18, 1853. Pub. Laws, 508. But it has been expressly repudiated and denied in the case of owners sui juris not consenting nor presuming from acquiescence to have consented.' To the same effect is *Hegarty's Appeal*, 75 Pa. St. 517. There are, no doubt, apparent exceptions to the rule; but these on closer view will be found to be in entire harmony with it.

"By the terms of the act of 1853 any party who is interested may invoke its aid; and the question now is whether the parties to the present proceeding are in that position. Certainly, the testamentary trustee, as such, is not, for by the express terms of the will it can only act, if at all, by the consent of its cestuis que trustent, and they are under no disability which the act can remedy. It is only where without the restriction of the trust the owners could act that the disability of the trustee may be removed: *Burton's Appeal*, 57 Pa. St. 218. If relief be sought by these tenants for life, as implied in the power of sale, the condition precedent of unanimity must also be implied, and such unanimity is wanting. If it be sought by them outside of the will, the answer is, that the act does not authorize the court to impose burdens which parties competent to act could not themselves enforce. Suppose these appellees had in fact erected substantial improvements, such as are contemplated here on the property in question, would anyone contend for a moment that they could enforce contribution as against the appellants

and the remaindermen? Have tenants for life any higher right than tenants in fee in respect of improvements on the common property? Surely not.

"But there is the additional consideration that the proposed lease will, as has been shown, be utterly inconsistent with the testator's declared purpose, and is therefore expressly excluded by the terms of the act of 1853. The 'power' to make, and the 'right' to demand a sale for the purpose of distribution, etc., cannot be 'impaired' by any order of court. The duty to sell is made imperative, and the right to the proceeds is vested in absolute ownership.

"The appellees insist that because the appellants 'unreasonably withhold' consent to highly beneficial improvements, the court has power to coerce them. If they owe a duty, this must be conceded, but they do not. It has been seen that neither by the terms of the will, nor by any rule of law or equity, is one tenant in common, whether for life or in fee, bound to contribute to the improvements at the mere instance of his fellow. The only security which one tenant has against 'improvement out of his title' by another, lies in total prohibition. The question of reason or unreason has no place. *Voluntas stat pro ratione*. The right of refusal is absolute. The act gives no power to coerce in such cases. There are, moreover, no parties whose 'consent' was 'required' by the will to the execution of any lease, and the appellants are not, therefore, within the terms of the act. The concurrent action of the tenants for life is in no sense ministerial in character for the 'execution' was the peculiar function of the trustee), but a pure matter of personal judgment beyond the reach of judicial action. The rule of law is well settled that when the consent of a third person is required to the execution of a power, that, like every other condition precedent, must be strictly complied with. So far as the tenants for life were concerned, their relation to the sale is a mere right of election pure and simple, whose exercise the court might, as in any other case, compel but not control. The primary intent was, that this property should be held during the lives of the children as it stood, and divided immediately on their death; and change in its form in the mean time is obviously a contingent matter in which each has an individual interest that is as much exempt from divestiture without his consent as any other interest in land. However well satisfied the court may be of the advantageous character of the proposed action to all parties interested it cannot substitute its own for the testamentary scheme, or 'impair rights and powers' which the act of 1853 expressly saves.

"In whatever light the proceeding is reviewed, the court was without jurisdiction. The act gives no power to coerce in such case. All the parties for whose immediate benefit these improvements are proposed are tenants in common for life, competent to act for themselves, and have no power to impose any burdens, save those which are incidental to their estate, on unwilling shoulders, even though the result may be admittedly beneficial to all. There are no necessities of justice calling for aid. The parties are now in the enjoy-

ment of every right which the testator intended, and the law can assure them.

"I would therefore reverse the decree, dismiss the petition, and set aside all proceedings at the cost of the appellees."

TRUSTS—STATUTES REGULATING.—There is a very great difference between the authority of the legislature over the estate of the trustee and its authority over that of the cestui que trust. The title of the former is not a beneficial or vested interest. He holds it merely that he may perform duties imposed by the trust, and he can, therefore, be divested of it without being divested of any valuable or vested right of property: Monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 272.

TRUSTS—POWER OF COURTS OVER.—Courts will not interfere with the exercise of discretionary powers by trustees where they are acting in good faith, without fraud or collusion, and without selfish, corrupt, or improper motives; but they will interfere where the exercise of discretion by trustees is infected with fraud or misbehavior, or is mischievously and ruinously exercised, or where they decline to undertake the duty of exercising discretion: *Randolph v. East Birmingham Land Co.*, 104 Ala. 355; 53 Am. St. Rep. 64, and extended note. See *Higberger v. Stiffler*, 21 Md. 333; 43 Am. Dec. 503; *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505.

NATIONAL MUTUAL INSURANCE COMPANY v. HOME BENEFIT SOCIETY.

[131 PENNSYLVANIA STATE, 442.]

INSURANCE—LIFE—FORFEITURE—FAILURE TO PAY PREMIUMS.—If a life insurance company has declared a policy forfeited without authority, and has refused to accept a premium, the fact that the insured subsequently failed to pay premiums as they fell due does not affect the right to recover on the policy.

INSURANCE—LIFE—FORFEITURE—FAILURE TO PAY PREMIUMS.—If an insurance company enters into a contract by which it agrees to transfer its membership to another company, and the latter agrees to take such members and reinsure them on the basis of their original applications in the former company on the execution of satisfactory transfer applications, and a member of the former company sends a check for a premium due, and fills out a transfer application, in which he states that he has recently recovered from an attack of pneumonia, but that his health is then fair, the latter company has no right to return his check and reject his application on the ground that it "is not satisfactory on account of physical condition and age," nor to insist that the applicant submit to a medical examination, and his failure to pay a subsequent premium when it falls due does not forfeit the right to recover on the policy.

Assumpsit on a policy of life insurance. Edward O'Brien held a policy of life insurance in the National Mutual Insurance Company of New York. This company entered into a contract with the Home Benefit Society, by which it agreed to transfer its membership to the latter company, and the latter agreed to reinsure said members on the basis of their original applications to the former company and on the execution of a satisfactory trans-

fer application. On April 17, 1894, a quarterly premium of seventy-seven dollars and twenty-five cents became due from O'Brien, and he sent this amount to the Home Benefit Society. It sent a transfer application to him, which he filled out, stating that he had recently recovered from an attack of pneumonia, but that his health was then fair. The company returned his check for the premium, and demanded that he be examined by the company's physician. This he refused to do, and did not pay the next premium falling due on July 17, 1894. He died the following August. Judgment for plaintiff, and defendant appealed.

J. G. Johnson, N. Heblich, and E. L. Mooney, for the appellant.

J. Ryon and G. W. Ryon, for the appellee.

448 McCOLLUM, C. J. There is nothing in the allowance of the amendments complained of which furnishes ground for reversing the judgment. The use plaintiff is the beneficiary named in the policy issued by the National Mutual Insurance Company on the life of her husband. But for the contract of March 28, 1894, her right to maintain an action against the insurer for the amount of the policy could not be questioned. If the insurer had unjustly declared the policy forfeited, and thereupon refused to accept from the insured the premium proffered in accordance with its terms, it could not, while insisting upon the forfeiture, set up the failure to tender the next quarterly premium as a bar to his suit for the enforcement of his rights: Girard Life Ins. Co. v. Mutual Life Ins. Co., 86 Pa. St. 236. In the case cited the company declared the policy forfeited for nonpayment of a quarterly premium on the day it was due, and, on tender of the same two days thereafter, declined to accept it. This occurred more than a year before the death of the insured, and there was no payment or tender of quarterly premiums after the rejection of the one above mentioned. It was held in an action against the company by the administrator of the insured that "where the company has declared a policy forfeited and refused to accept a premium the fact that the insured subsequently failed to pay premiums as they fell due will not affect the right to recover on the policy." That which is not a bar to an action on the policy by the insured or his administrator is not a bar to a suit against it by the beneficiary named in it. If, therefore, the defendant in this case was bound by its contract with the National Mutual Insurance Company to reinsure Edward O'Brien on the basis of his original application to, and the terms of his insurance with, the latter, his failure to tender the July premium cannot operate as a

defense. Its denial that it was bound to reinsure him and its refusal to accept the April premium rendered a tender of the next quarterly premium unnecessary. We cannot find in the evidence anything which operates as a release of the defendant from any liability imposed by its contract. The respective rights of O'Brien and the defendant under the contract were not extinguished or qualified by anything said or done by either of them. The case was tried in the court below on the apparently mutual theory of the parties ⁴⁴⁹ to it that the plaintiff was entitled to recover the amount of the policy or nothing. No claim or suggestion appears to have been made by either of them that there might be a recovery for a less sum. It was the existence of the liability claimed by the plaintiff and denied by the defendant, and not the extent or measure of it, that was in dispute.

The National Mutual Insurance Company agreed "to transfer, or cause to be transferred, to the best of its ability," the membership of it to the defendant. It could do no more in this direction because the New York statute under which the contract was made expressly conceded the right of every member of it, on giving the required notice to elect to be transferred to or reinsured by another company. The defendant agreed to reinsure the members of the National Mutual Insurance Company upon execution of satisfactory transfer applications on the basis of their original applications to it, and to rate them at the same amount with premiums payable at same dates as they were then paying in it. What effect has the requirement of a satisfactory transfer application upon the liability of the defendant? Does it warrant the refusal of the defendant to reinsure a member on the ground that his application for transfer "is not satisfactory on account of physical condition and age?" This is the distinct ground on which the defendant refused to reinsure O'Brien. If it is tenable ground for refusal, the agreement respecting the basis of reinsurance and the rating of members amounts to nothing, because the defendant may reject the transfer application of any member whose age or health may appear to it as presenting an undesirable risk.

The contract as construed by the defendant fails to afford to the membership of the National Mutual Insurance Company the protection contemplated by the statute under which it was made. It was not so construed by that company when its members were requested to approve it. On the contrary, their approval was obtained on the express assurance that they would be transferred without examination as at the age of entry in the National Mutual Insurance Company, and at the same rates and dates of payments as with it. This assurance was warranted, we think, by the

terms of the contract. The words "satisfactory transfer application, etc.," considered in connection with what precedes and follows them, do not mean that the defendant ⁴⁵⁰ will reinsure the applicant for transfer on condition that his age and health are satisfactory to it. To attribute to them this meaning is to defeat the obvious purpose of the contract and of the statute which authorized it. The paramount purpose of the contract was protection to the members of the National Mutual Insurance by reinsurance with the defendant. In our view of the contract, it bound the latter to reinsure the members of the former who elected to have their insurance transferred in accordance with its provisions. The defendant sent an application for transfer to O'Brien who fully and correctly answered all the questions propounded in it, and signed it as instructed. It neither disclosed nor concealed anything which released the defendant from its obligation to him. It must therefore be regarded as a "satisfactory transfer application" within the meaning of the contract. Thenceforth the defendant was liable for the amount of his policy with the National Mutual Company on his compliance with its provisions respecting premiums and the payment of them. As we have already seen, his failure to tender the July premium is not a bar to this action. The views herein expressed are in accord with the able opinion filed by the learned court below on discharging the rule for a new trial.

We infer from the record that the defendant was not allowed a credit for the April and July premiums, amounting to one hundred and fifty-four dollars and fifty cents. If this inference is in accordance with the fact, we direct that the court below cause a credit to be entered on the judgment for that amount.

The judgment, subject to the above direction, is affirmed.

INSURANCE—LIFE—PREMIUM—FORFEITURE FOR NON-PAYMENT—WAIVER.—The right to declare a forfeiture of a policy for the nonpayment of premiums may be waived, and the waiver may be manifested by conduct as well as by words: *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203, and note. See *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516; 29 Am. Rep. 200, and extended note. If a life insurance company wrongfully refuses to accept a premium and determines the policy, the insured may treat the policy as determined: *McCall v. Phoenix Mut. Life Ins. Co.*, 9 W. Va. 237; 27 Am. Rep. 558. See *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584; 39 Am. St. Rep. 316, and note; *Appleton v. Phoenix Mut. Life Ins. Co.*, 59 N. H. 541; 47 Am. Rep. 220. Where an insurer, after loss, relies upon a specified defense alone, and so notifies the assured, he will not be permitted to retract it and set up a new and different defense, where the assured has relied upon the defense announced to his prejudice: *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 316; 27 Am. St. Rep. 703. See, also *Stylow v. Wisconsin Odd Fellows' etc. Ins. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and note.

COMMONWEALTH v. EISENHOWER.

[181 PENNSYLVANIA STATE, 470.]

MURDER—KILLING BY MISTAKE.—The fact that a person otherwise guilty of murder in the first degree killed another than the person intended does not in any degree lessen his guilt.

MURDER—CAUSE OF DEATH.—A person otherwise guilty of murder cannot escape by showing that the death was the result of an accident occurring in an operation made necessary by his felonious act.

JURIES.—JURORS WHO HAVE BEEN “STOOD ASIDE” are properly recalled in the order in which they have been “stood aside,” and the accused is not thereby deprived of any right, nor does he suffer any injury.

TRIAL—ORDER OF.—DISCRETION.—The general conduct of a trial, as well as the order in which it shall proceed, is largely within the discretion of the trial court, and it is only when abuse of such discretion is clearly shown that the appellate court may interfere.

MURDER—CROSS-EXAMINATION OF THE ACCUSED.—If the accused in a murder trial has testified in his own behalf, he may be recalled for cross-examination during the time that rebuttal evidence for the prosecution is being offered.

MURDER — APPELLATE PRACTICE.—IMPROPER REMARKS OF COUNSEL for the prosecution in a murder trial cannot be reviewed on appeal when attention was not called to them on the trial, and they are not part of the record, although they were embodied in grounds for a new trial.

MURDER—SEPARATION OF JURY—PRESUMPTION—REBUTTAL.—In cases of conviction of murder, the separation of the jurors further than is necessarily required to enable them to perform their duties as such, and under the care of a sworn officer, creates a presumption of improper influence, but this presumption may be rebutted by the prosecution by clear and convincing proof.

MURDER—CONDUCT OF TRIAL—PRIVATE COUNSEL.—The action of the trial court in permitting private counsel to close the case for the prosecution in a murder trial is not ground for the reversal of the verdict and judgment.

Indictment, trial, and conviction for murder in the first degree. Defendant appealed.

C. N. Brunn and G. Dyson, for the appellant.

E. W. Bechtel, district attorney, and J. F. Whalen, for the appellee.

475 PER CURIAM. A careful consideration of the voluminous record in this case has convinced us that there is no error therein of which the prisoner has any just reason to complain. The trial appears to have been so conducted by the learned president of the eighth judicial district, who specially presided thereat, as to secure for the accused a fair and impartial trial. We find nothing in any of his rulings that would justify us in reversing the judgment of the law pronounced on the verdict; nor is

there anything in either of the specifications of error that requires discussion.

• It was conclusively shown, and is not denied, that as John Schwindt, the deceased, was returning home from his work in company with a fellow workman, he was followed by the prisoner, whose presence was unknown to them, and shot in the back with a pistol at short range. The ball entered near the tenth dorsal vertebra, and passing through the spinal column, partly severing the cord, lodged in the vertebra on the opposite side. It was claimed by the commonwealth, and the evidence tended strongly to prove, that the pistol shot wound thus inflicted by the prisoner was the cause of Schwindt's death within less than ten days thereafter. Without attempting to collate or further refer to the evidence on which the commonwealth relied for a conviction of murder of the first degree, it is quite sufficient to say it was not only abundant, and practically undisputed, but it tended strongly to prove that a willful, deliberate, and premeditated murder was committed by the prisoner. While the shooting was not, nor could it be, denied by him, he claimed that he mistook the deceased, John Schwindt, for his twin brother, William Schwindt, with whom he had been on unfriendly terms for some time, and whose life, as shown by the testimony, he had repeatedly threatened. Conceding what—according to the evidence—was doubtless the fact, that by mistake the prisoner shot the wrong person, that, of course, could not in any degree lessen his guilt. The grounds of defense relied on were: 1. Insanity of the prisoner at the time of the shooting and prior thereto; and 2. That John Schwindt's death resulted not from the pistol shot wound, but from the surgical operation performed by the physicians in their efforts to extract the pistol ball, etc. Some testimony was introduced for the purpose of sustaining each of these positions. The case ⁴⁷⁰ was fairly submitted to the jury, on all the evidence properly before them, in a clear, comprehensive, and fully adequate charge, in which they were distinctly and accurately instructed by the learned trial judge, not only as to the questions pertaining to the two lines of defense above stated, but also as to all the questions presented by the evidence on both sides. Referring to the allegation, relating to the second ground of defense, that a lost drainage tube (inserted by the surgeons in attendance to relieve their patient, etc.) "found its way into the spinal canal and caused the death of John Schwindt," the learned judge said: "But suppose it did, the prisoner cannot escape by showing that death was the result of an accident occurring in an operation which his felonious act made necessary. There is no pretense

that the drainage tubes were not required, or that they were improperly placed." This was clearly correct; and, without specially referring to them, the same remark is applicable to the instructions given in relation to both lines of defense. The jury, under proper and adequate instructions, refused to find in favor of the prisoner on either ground, and we have no doubt they were fully warranted by the evidence in so doing.

There was no error in denying the motion to recall first the juror that had been last "stood aside." The action of the court in requiring the "stood aside" jurors to be recalled in the order in which they had been "stood aside" was in conformity to the practice which has long prevailed in this country and in England: 1 Thompson on Trials, sec. 49 n. We have never known the practice in this state to be otherwise. The action of the court, therefore, deprived the prisoner of no right; nor could it have done him any injury.

The second to fifth specifications, inclusive, are based on a misapprehension of the record. The order in which a trial shall proceed must be left largely to the discretion of the court. The prisoner having taken the stand in his own behalf was open to cross-examination by the commonwealth. He was recalled during the time the rebuttal testimony of the commonwealth was being offered, not to give evidence in rebuttal, as his counsel asserts, but for further cross-examination. The other matters complained of do not require special notice. There is no merit in either of them. Nor is there any merit in the sixth specification. In disposing of the motion for a new trial, the learned ⁴⁷⁷ judge says the court's attention was not called to the alleged remarks of the district attorney at the time. Unless that is done, remarks of counsel cannot be considered: Commonwealth v. Windish, 176 Pa. St. 167. The remarks complained of are not properly on the record. They are embodied in the reasons for a new trial, but the discretion of the court in refusing a new trial is not reviewable in such circumstances as appear in this case: Alexander v. Commonwealth, 105 Pa. St. 1.

While, in cases of conviction of capital offenses, the fact of the separation of the jurors further than is necessarily required to enable them to perform their duties as such, and under the care of a sworn officer, creates a presumption of improper influence; but it is a presumption which the commonwealth may rebut by clear and satisfactory evidence: Moss v. Commonwealth, 107 Pa. St. 267. In this case, the evidence was amply sufficient for that purpose.

The action of the court in permitting private counsel to close

the case for the commonwealth furnishes no ground for reversal. The general conduct of a trial is largely within the discretion of the judge presiding; and it is only when some abuse of that discretion is clearly shown that an appellate court will interfere. Nothing of the kind appears in this case.

The subject of complaint in the eighth and last specification has already been noticed. The charge of the court in relation thereto was quite as favorable to the prisoner as he could reasonably ask.

Several of the assignments of error are destitute of merit; and, as already stated, there is nothing in any of them that would justify a reversal of the judgment. They are all overruled.

The judgment of the court below is affirmed, and it is ordered that the record be remitted for the purpose of execution.

HOMICIDE—KILLING ANOTHER THAN PERSON INTENDED.—When one person forms a deliberate purpose to kill another and fires a pistol at him for that purpose, the fact that the ball misses its intended victim and kills another person does not relieve the murderer: *Commonwealth v. Breyessee*, 160 Pa. St. 451; 40 Am. St. Rep. 729, and note. See extended note to *Holmes v. State*, 16 Am. St. Rep. 20.

HOMICIDE WHILE COMMITTING FELONY — UNINTENTIONAL.—A person who, in committing a felony, undesignedly kills another, is guilty of murder, especially if death was a probable consequence of his act: *State v. Cooper*, 1 Greenl. 361; 25 Am. Dec. 490; note to *Holmes v. State*, 16 Am. St. Rep. 20; as if the felony be rape or sodomy: *State v. Deschamps*, 42 La. Ann. 567; 21 Am. St. Rep. 392; or attempted suicide: *State v. Levelle*, 84 S. O. 120; 27 Am. St. Rep. 769, and note.

APPEAL—TRIAL.—The order of proof is always within the discretion of the trial court, and will not be interfered with by the appellate court, unless there has been an abuse of discretion: *Kindel v. Le Bert*, 23 Colo. 385; 58 Am. St. Rep. 234, and note.

APPEAL IN CRIMINAL CASES—IMPROPER REMARKS OF COUNSEL AT TRIAL.—The supreme court has no power in capital cases to review points not taken in the court below nor filed of record, but is confined to exceptions taken on the trial to some question of evidence or law, or to the opinion of the court below upon a written point, which, with the decision, must be filed of record as in civil cases: *Hopkins v. Commonwealth*, 50 Pa. St. 9; 88 Am. Dec. 518. As to when errors in the arguments of counsel are grounds for reversal, see *Weatherford v. State*, 31 Tex. Crim. Rep. 530; 37 Am. St. Rep. 828, and note; *Rahm v. State*, 30 Tex. App. 310; 28 Am. St. Rep. 911, and note; *People v. Aikin*, 66 Mich. 460; 11 Am. St. Rep. 512.

TRIAL—SEPARATION OF JURORS.—The rule in this country prohibiting the separation of the jury in capital cases is almost universal: Extended note to *State v. State*, 60 Am. Rep. 73. See monographic note to *McKinney v. People*, 48 Am. Dec. 83-87, discussing the rule and exceptions thereto.

MUEHLING v. MUEHLING.

[181 PENNSYLVANIA STATE, 488.]

MORTGAGES—FIXTURES.—If a mortgagor agrees with a mortgagee to place machinery to a certain amount on the mortgaged premises, and such machinery, when placed thereon, is attached thereto, it becomes a fixture subject to the lien of the mortgage, although some part of it is placed in the building after the mortgage was executed.

Action to subject certain machinery to the lien of a mortgage. Under an agreement, the members of a partnership borrowed money to build a knitting mill, and gave a mortgage requiring the mortgagors to place therein necessary machinery and to insure it for the protection of the mortgagees. The machinery in question, mentioned in the opinion, was essential to the proper operation of the mill, and was fastened to the floor and run by the general steam plant. It was placed in the mill after the execution of the mortgage. Judgment for the plaintiff, and the defendants appealed.

H. J. Kotz, E. A. Anderson, and A. R. Brittain, for the appellant.

C. B. Staples and W. A. Erdman, for the appellees.

⁴⁹⁰ McCOLLUM, J. The question to be determined on this appeal is whether the hosiery knitters, ribbers, steam press, and dynamo purchased for and placed in the knitting mill, by the owners thereof, were intended by them as component parts of their factory, and subject to the lien of the mortgage upon it, or as personalty subject to removal by them at their pleasure and against the protest of their mortgagee. The learned auditor to whom the question was referred found as a fact that it was their intention in placing this machinery in the mill to place it there as fixtures and a constituent part of their factory. This finding was approved by the learned court below, and, if there was a sufficient warrant for it in the evidence, we cannot reverse it.

We have carefully read and considered all the evidence, oral and documentary, and our conclusion from it accords with the finding in question. The agreement of September 11, 1889, under which the money for the erection of the factory was furnished, and in pursuance of which the factory was mortgaged, contained a requirement by the mortgagee and a promise by the mortgagors which bound the latter to place in the factory for the proper operation of it, machinery worth at least ten thousand dollars, and to maintain an adequate insurance thereon for the protection ⁴⁹¹ of the former. It seems to us that this agreement

is in clear accord with the view that it was the intention of the mortgagors that all the machinery employed in the operation of the factory should constitute a component part of it. The manner in which the machinery was connected with the factory, and the fact that it was deemed essential to the proper performance of the work done there, are circumstances corroborative of this view. The mortgage was executed in conformity with the agreement, and the parties to it seem to have understood that it included the machinery as well as the buildings with which it was connected. When Johnson withdrew from the partnership of Muehling & Johnson he agreed to convey to Muehling his interest in the real estate, buildings, machinery, and fixtures connected therewith, subject to the mortgage. This agreement shows that he considered the machinery and fixtures as real estate on which the mortgage was a lien. The learned counsel for the appellant appear to concede that the machinery in the factory when the mortgage was executed was included in and bound by the latter, but they claim that the machinery in question was put in the factory subsequent to the execution of the mortgage, and is not subject to the lien of it. As sustaining this view they cite *Tillman v. De Lacy*, 80 Ala. 103, and *Clore v. Lambert*, 78 Ky. 224. These cases are referred to as authority for the proposition that "where the chattel is annexed after giving the mortgage, and is of doubtful character, there must be stronger evidence of intention to make a permanent accession to the freehold than if it were annexed prior to or at the time of giving the mortgage." But this proposition, if sustained by the cases cited, furnishes no ground for reversing the finding in question, because the evidence to support it is ample. Besides, our own cases seem to hold a different view. In *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71, a steam-engine and boilers were detached from a property covered by a mortgage, and it was sought to justify the severance on the ground that they were attached after the property was mortgaged, and it was held that, "though the engine and boilers were put up after the mortgage to the plaintiff was given, they constituted a part of the mortgage security, and they were not liable to removal by the mortgagor or her assigns if such removal was injurious to the mortgagee, who has a right to benefit from any appreciation of the mortgaged ⁴⁹² premises arising from any cause": See, also, on this point, *Morris' Appeal*, 88 Pa. St. 368.

Decree affirmed and appeal dismissed, the costs to be paid by the appellant.

FIXTURES—WHAT SUBJECT TO PRIOR MORTGAGE AS.—
Whatever is placed in a building subject to a mortgage,

by a mortgagor or those claiming under him to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235. The prior mortgage attaches to them, and they cannot be disposed of by the mortgagor while the mortgage remains in force: *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; 38 Am. Dec. 368, and note; *Foot v. Gooch*, 90 N. C. 265; 60 Am. Rep. 411; *Butler v. Page*, 7 Met. 40; 39 Am. Dec. 757. But this rule, being founded upon the common-law conception of a mortgage, has been held inapplicable in states where a mortgage is a mere security, conveying neither title nor right to possession: *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211; 43 Am. St. Rep. 491, and note.

DENI v. PENNSYLVANIA RAILROAD COMPANY.

[191 PENNSYLVANIA STATE, 525.]

NEGLIGENCE—DEATH—RIGHT TO RECOVER—PROOF OF RELATIONSHIP.—To enable a mother to recover for the death of her adult son caused by negligence, the burden of proof is on her to show the existence in fact of a family relationship which entitles her to maintain such action.

NEGLIGENCE—DEATH CAUSED BY—RIGHT TO MAINTAIN ACTION.—A nonresident alien mother is not included within the terms of a state statute simply giving to parents and others the right to recover for the death of their child or children caused by negligence.

NEGLIGENCE—DEATH CAUSED BY—RIGHT OF ACTION.—A statute conferring the right to recover for a death caused by negligence does not confer such right upon nonresident aliens.

Trespass to recover for a death caused by negligence. The statute of April 26, 1855, mentioned in the opinion, simply provides that: "The persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative."

F. H. Thole, for the appellant.

D. W. Sellers, for the appellee.

527 **McCOLLUM, J.** Stephen Deni came to this country in 1889, and he was then twenty-seven years old. While employed by the defendant company as a laborer on its roadbed or track, he was on October 28, 1894, killed in a collision which was imputed to the negligence of his employer. It is claimed that, inasmuch as his day's work was done and he was in the company's car for the purpose of riding in it to his boarding place, he was a passenger and not an employé of the company when the collision occurred. For the purposes of this case he may be considered as a passenger at the moment he was killed. While in this country his wages never exceeded one dollar and twenty cents a day, and

this sum represented ten hours' work. From his wages he had to pay for his board, washing, and clothing. Assuming that he worked on full time, and on every week day of the year, the balance, after paying the necessary expenses of his own maintenance, was not large. The claim that he regularly remitted money to and for the maintenance of his mother in Italy was not supported by convincing or satisfactory evidence. His cousin, Ferdinand Deni, testified that Stephen told him, on September 20, 1894, he had sent his mother twenty dollars. Joseph Narcitto testified that in August of that year Stephen told him he had twenty dollars and "wanted to borrow another twenty dollars so as to send it to his mother." These were the only witnesses who testified in regard to a specific or particular remittance, and it clearly appears from their testimony that their information respecting it was based on what Stephen said to them. Ferdinand Deni and Palmo Deni, a brother of Stephen, testified in general terms that Stephen sent money to his mother. But it is noticeable that neither of them testified to having seen Stephen make at any time a remittance to her in any form. Ferdinand said "the attorney has the receipts from the bank that the money was sent to Italy," and that Carlo Barsotti was the banker through whom it was sent. The receipts were not produced, nor the banker called to testify, although his place of business was but a few squares from the place of trial. The plaintiff knew whether Stephen contributed to her support, and she was competent to testify in her own behalf. But her testimony was not obtained, nor does it appear that any effort was made to ⁵²⁸ obtain it. Of course, Stephen's declarations were not competent evidence of contributions by him to her maintenance.

Stephen Deni did not see his mother after he left her in Italy in 1889. She still resides in her native country, and owes allegiance to the government of it. The burden was on her to show the existence in fact of a family relationship which entitled her to maintain the suit. In view of these facts and the evidence in the case, the learned court below thought she could not recover, and accordingly entered a compulsory nonsuit.

No case has been cited to us, nor are we aware of any, in which a nonresident alien, whether husband, widow, child, or parent of the deceased, has maintained a suit, under the act of April 26, 1855 (Pub. Laws, 309), to recover damages for an injury causing death. Our legislation on this subject is in accord with the English statute of August 26, 1846, and, therefore, the decisions of the English courts construing this statute are often referred to in cases grounded upon our acts of April 15, 1851, and April 26,

1855. But no case has been brought to our notice in which an English court has held that a nonresident alien is entitled to the benefits conferred by the act of 1846. The same may be said of the decisions of the courts of our sister states having statutes similar to our own. May a citizen of the United States whose son, while traveling in England, is killed in a collision on an English railway, through the negligence of the owners or operators of it, maintain an action in an English court under and by virtue of the English statute we have referred to? If he cannot it is because the statute does not include a nonresident alien. As the English statute is like ours, there would seem to be more reason for allowing a suit to be maintained under it by a citizen of this country than by a citizen of a country which has no such statute. Presumably, if the death of the plaintiff's son occurred in her own country, as it did here, she could not maintain a suit for the loss she sustained by it, and if the death of a son of a citizen of this country occurred there under like circumstances, the latter could not maintain a suit for the loss he suffered by it. No statute or law of Italy has been shown which authorizes such a suit.

Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. A nonresident defendant is not entitled to the benefit of our exemption laws, although the language of these laws may admit of a construction which would include him. It has been so held in a number of our cases. In this connection the language of Mr. Justice Sterrett, in *Collom's Appeal*, 2 Pennyp. 130, is pertinent. In delivering the opinion of the court he said: "While nonresident debtors may, perhaps, be within the letter of the act, we do not think they are within its spirit. As was said by Mr. Justice Woodward in *Yelverton v. Burton*, 26 Pa. St. 351, and afterward quoted approvingly by the present chief justice in *McCarthy's Appeal*, 68 Pa. St. 217, we do not legislate for men beyond our jurisdiction." In one respect, at least, our act of 1855 resembles our exemption laws. It is intended, primarily, for the benefit of the family of which the deceased was a member. The act of 1851 gave a right of action to the personal representatives of the deceased. Mr. Justice Green referred to this act in *Books v.*

Danville, 95 Pa. St. 158, and said: "The effect of this act was to make the damages recoverable in such actions general assets of the deceased in the hands of the personal representatives, and, of course, they were available to creditors in the first instance. It follows that in all cases of insolvent estates of such deceased persons, where the victim of the injury was the husband and father, the widow and children derived little or no advantage from the action, although they were the persons most directly and severely injured." But this objection to the act of 1851 was overcome by the act of 1855 which designated the persons to receive the sum recovered, and directed that they should take it in the proportion they would take the personal estate of the deceased, in case of intestacy, "and that without liability to creditors." In *Bacon v. Horne*, 123 Pa. St. 452, it was held that the act of May 3, 1855 (Pub. Laws, 415), relating to the recording of an assignment made for the benefit of creditors by a resident of another state, ⁵³⁰ which assignment included property of the assignor in this state, was for the protection of our own citizens, and that a creditor of the assignor who was a resident of the state in which the assignment was made could derive no benefit or protection from the act, although he was without notice of the assignment. There is nothing on the face of the act which limits the protection afforded by it to our own citizens. It is referred to as another illustration of the general rule that we do not legislate for persons beyond our jurisdiction.

We have a number of statutes which expressly confer rights upon aliens, but none which confers them by implication or inference. When the legislature intends to concede to nonresident aliens the rights which our own citizens have under and by virtue of the act of April 26, 1855, it will say so.

Our conclusion is, that the learned court below did not err in entering the nonsuit.

Judgment affirmed.

NEGLIGENCE CAUSING DEATH—STATUTORY ACTION FOR.—At common law, a civil action does not lie for causing the death of a human being: *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241; 49 Am. St. Rep. 192; extended note to *Edgar v. Castello*, 37 Am. Rep. 716-719. And statutes giving a right of action for injuries causing death are, according to the better opinion, remedial in their nature and to be liberally interpreted so as to advance the remedy: Monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 635; though such a statute has been held as in derogation of the common law and to be, therefore, strictly construed: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459; 55 Am. St. Rep. 185; monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 635. It is well settled that such statutes have no extraterritorial effect: *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206; 12 Am. St. Rep. 863, and note;

Jackson v. Pittsburgh etc. Ry. Co., 140 Ind. 241; 40 Am. St. Rep. 182, and note. And persons seeking to recover damages under them must bring themselves clearly within their terms: **McDonald v. Pittsburgh etc. Ry. Co.**, 141 Ind. 459; 55 Am. St. Rep. 185.

ESTATE OF CLAGHORN.

[181 PENNSYLVANIA STATE, 600.]

JUDGMENTS BY CONFESSION.—Judgments entered on a specialty with warrant to confess judgment must follow strictly the authority conferred by the warrant. The attorney who executes the warrant cannot change its terms or enlarge its scope.

EXECUTORS AND ADMINISTRATORS—BOND OF—PERSONAL LIABILITY.—A creditor who takes a bond for his debt from an executor or administrator discharges the old debt, and the fact that the executor or administrator calls himself such in the bond is mere surplusage, and he is chargeable only in his own right.

EXECUTORS AND ADMINISTRATORS—STATUTE OF LIMITATIONS—VOID PROMISE.—A promise by an executor not to plead the statute of limitations against a certain creditor when he presents his claim is void and does not bind the estate, the executor, nor another creditor.

ESTATES OF DECEDENTS—RIGHTS OF CREDITORS.—If the funds of the estate of a deceased person are not sufficient to pay all of its creditors, each creditor has a right to oppose any other claimant by showing payment of the debt, or that it is barred by the statute of limitations, and the executor cannot bar the creditor's right to plead such statute by refusing to plead it himself.

EXECUTORS AND ADMINISTRATORS—STATUTE OF LIMITATIONS—NEW PROMISE—PERSONAL LIABILITY.—The personal representative of a decedent is not answerable for a cause of action not created by the decedent; and if by a new promise he revives a debt already barred by the statute of limitations, or prolongs the life of one not yet barred, the contract is his own, and he is personally answerable; and though he is not bound to plead such statute when he believes the debt to be unpaid, yet in the distribution of a fund, creditors whose interests are affected can plead it.

EXECUTORS AND ADMINISTRATORS—STATUTE OF LIMITATIONS—FAILURE TO PLEAD.—If suit is brought against a personal representative of a decedent in his representative capacity on a debt barred by the statute of limitations, and he waives his right to plead it, the judgment therein is *de bonis testatoris* and can not be questioned thereafter on distribution of the estate.

JUDGMENTS—COLLATERAL ATTACK.—It is not questioning a judgment collaterally to ascertain from the record against whom it is rendered, and whether it can be legally paid out of the fund for distribution.

J. Weaver, J. G. Johnson, and J. Sparhawk, Jr., for the appellant.

T. H. Talbot and I. D. Yocum, for the appellee.

602 DEAN, J. Julia Claghorn and J. Raymond Claghorn, widow and son of James L. Claghorn, deceased, and executors of

his will, filed their first account in the orphans' court May 27, 1895; their testator died August 25, 1884, and the wife and son were the sole beneficiaries under his will, and from the date of testator's death had been in possession of his estate; the will expressly enjoined that they were not to give bond for the faithful performance of their duty as executors. It is not clear from the evidence and the confused and tangled account filed whether the estate of testator was solvent at his death; it is very clear that when the first account was filed, more than ten years afterward, it was largely insolvent. There was for distribution, after adding a surcharge of \$2,905 and deducting counsel fees and expenses, a balance of \$24,867. But two creditors claimed payment out of this fund, Mrs. Emma C. F. Keller, who demanded \$36,344.34, with interest from May 1, 1894, and the Commercial National Bank, \$4,300, with interest from March 22, 1894. The court below allowed both claims and directed a distribution of the balance pro rata. From this decree Mrs. Keller appeals, assigning for error the allowance of the bank's claim. It follows, if her appeal be successful, the payment to her will be increased \$4,300, with interest from March 22, 1894. Her averment is, no valid claim against the fund was exhibited before the court below by the bank, therefore it was error to allow it.

The claim of the bank was founded on a judgment entered by it in common pleas of Philadelphia county against James Raymond Claghorn and Julia Claghorn, executors of James L. Claghorn, April 19, 1894, for \$10,000, conditioned for the payment of three promissory notes, amounting to \$7,750, of which ~~was~~ J. Raymond Claghorn was drawer and his father in his lifetime was indorser. It was admitted at the adjudication that J. Raymond Claghorn had reduced the amount of the real debt by payments to the sum of \$4,300, with interest from March 22, 1894.

It is argued by appellant: 1. That on the evidence, and from the record of the common pleas, the debt was that of J. Raymond Claghorn individually, and not of the estate; 2. That the judgment from its terms is against the executors personally, and not against them in their representative capacity; therefore, it cannot be distributed to from the fund.

It is settled that every judgment entered on a specialty with warrant of attorney to confess judgment must follow strictly the authority conferred by the warrant; the attorney who executes the warrant cannot change its terms or enlarge its scope. The bond and warrant are as follows:

"Know all men by these presents that we, Julia S. Claghorn and J. Raymond Claghorn, executors of the last will of James L

Claghorn, deceased, are held and firmly bound unto the Commercial National Bank of the state of Pennsylvania, in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said obligees, their certain attorney, successors, or assigns, to which payment well and truly to be made we do jointly and severally bind ourselves and our successors in the trust firmly by these presents. Sealed with our seals. Dated the twelfth day of July, A. D. 1889.

"Whereas, the said bank held at the decease of James L. Claghorn sundry promissory notes of J. Raymond Claghorn indorsed by the decedent, and whereas the amount remaining unpaid is seven thousand seven hundred and fifty dollars, represented by three notes of J. Raymond Claghorn, each payable three months after date—one dated May 9th, 1889, for \$1500.00; one dated May 29th, 1889, for \$5,500.00; one dated June 21st, 1889, for \$750.00; and the bank holds as collateral the original notes indorsed by James L. Claghorn, and the said executors have agreed to execute the present bond and warrant to prevent the claim of the bank against said decedent's estate from being barred by the statute of limitations.

"Now the condition of this obligation is such, that if the said J. Raymond Claghorn, his heirs, executors, or administrators shall pay at their respective maturity his three notes above ^{now} designated, and shall also pay at maturity all renewals thereof in whole or in part until the indebtedness of decedent's estate to the bank is fully paid; then this said obligation shall be void, or else be and remain in full force and virtue. No judgment to be entered by virtue of the annexed warrant until default is made in the payment of said notes or their renewals when such renewals are granted by the said bank.

"(Signed) JULIA S. CLAGHORN. [Seal]

"(Signed) J. RAYMOND CLAGHORN. [Seal].

"WARRANT OF ATTORNEY.

"To James W. Paul, Esq., attorney of the court of common pleas of Philadelphia, in the state of Pennsylvania, or to any other attorney of the said court or of any other court there or elsewhere: Whereas, we, Julia S. Claghorn and J. Raymond Claghorn, executors of the last will and testament of James L. Claghorn, deceased, in and by a certain obligation bearing even date herewith, do stand bound unto the Commercial National Bank of the state of Pennsylvania in the sum of ten thousand dollars, lawful money of the United States of America, conditioned for the payment at their respective maturity, of three promissory notes of J. Ray-

mond Claghorn, all drawn payable three months after their respective dates: one dated May 9th, 1889, for \$1,500.00; one dated May 29th, 1889, for \$5,500.00; one dated June 21st, 1889, for \$750.00; and of the payment of any of the renewals of the said notes when renewed by the said bank:

“In default of any such payment these are to desire and authorize you to appear for us, our heirs, executors, or administrators, at the suit of the said bank, their successors or assigns, on an action of debt there or elsewhere brought or to be brought against us, our heirs, executors or administrators, upon the said obligation, and confess judgment thereon against us, our heirs, executors, or administrators, for the sum of ten thousand dollars by non sum informatus nihil dicit, or otherwise as to you shall seem meet, and for you or any of you so doing, this shall be your sufficient warrant.

“In witness whereof we have hereunto set our hands and seals this twelfth day of July, A. D. 1889.

“JULIA S. CLAGHORN. [Seal]

“J. RAYMOND CLAGHORN. [Seal]”

••• It will be noticed: 1. That by the bond, the undertaking is that “Julia S. Claghorn and J. Raymond Claghorn, executors of the last will and testament of James L. Claghorn, deceased, are held and firmly bound” unto the bank, and they further undertake that their successors in the trust shall be bound; it is further declared that the bond and warrant are executed to prevent the running of the statute against the estate of James L. Claghorn, who was indorser for his son, J. Raymond Claghorn; 2. The condition, in substance, is that if J. Raymond Claghorn does not pay his debt to the bank, the estate will continue answerable; 3. The full authority in the warrant is that if Julia S. Claghorn and J. Raymond Claghorn, executors, do not pay the three notes of J. Raymond Claghorn at maturity, then any attorney is authorized to appear for them, their heirs, executors, or administrators, at the suit of the bank, against them, their heirs, executors, or administrators, and confess judgment thereon against them, their heirs, executors, and administrators. In the warrant the authority is to appear for them, their heirs, executors, and administrators, and to confess judgment against them, but not in their representative capacity.

By the warrant, therefore, the judgment is against them personally; there is no judgment or adjudication by a court of record against the estate of James L. Claghorn. The bond itself may be construed as a promise that they will not plead the statute against the bank, when the assets are for distribution; it amounts

to nothing more. And they kept this promise; they did not plead the statute against the bank on the distribution. We have, then, a promise by the two executors, one of whom was the principal debtor, and his father, the surety, that they will not plead the statute in favor of the father's estate. To what extent does this promise bind the estate on a distribution, eleven years after the testator had contracted a simple debt, which in six years was barred by the statute?

In *Geyer v. Smith*, reported in a note, 1 Dall. 347, it was held, as early as 1789, on the authority of many English cases cited, that a creditor taking a bond from an executor or administrator discharges the old debt; that calling himself executor or administrator in the bond is mere surplusage, and that he is chargeable only in his own right. This was followed by *Jones v. Moore*, 5 Binn. 573, 6 Am. Dec. 428, *Bailey v. Bailey*, 14 Serg. & R. 195, and ⁶⁰⁸ *Scull v. Wallace*, 15 Serg. & R. 231, in each of which it was taken for granted as said by Gibson, C. J., in *Fritz v. Thomas*, 1 Whart. 66, 29 Am. Dec. 39, that an acknowledgment of the debt by the personal representative would take the case out of the statute, but the point was not adjudged. So in the last-named case the court felt at liberty to decide the case directly, and it was held that the executor or administrator "is answerable in his official character for no cause of action that was not created by the decedent himself." And, further, that the administrator "cannot charge himself personally without a new consideration; he cannot charge the estate on the foundation of the old one to the prejudice of creditors whose fund might be materially lessened by it. He is not bound to plead the statute; because he may know the debt to be a just one; and, for that reason, the matter is left to his discretion; but it follows not that he may tie up his hands from using it, when the time comes, by a mistaken concession, or an engagement which had no consideration to bind him personally or officially. . . . Indeed there is no course open to us but to follow the principle out or abandon it altogether; for to be consistent we must either return to the doctrine of revival without qualification, or maintain that an action on his own promise lies not against an executor or administrator in his official character." This decision has either been followed or recognized in every case in which the point has been raised since, commencing with *Reynolds v. Hamilton*, 7 Watts, 420, down to *Reed v. Reed*, 46 Pa. St. 239.

This, then, is a promise by the executors not to plead the statute of limitations against this creditor when he presented his claim. It does not bind the estate; they, under the authorities,

were not even bound not to plead it on distribution, but might then have set it up in the face of their original promise. They do not do so, but a creditor, this appellant, does. Would it avail her when the executors waived the right to plead it? *Fritz v. Thomas*, 1 Whart. 66, 29 Am. Dec. 39, by plain implication, holds the promise of the executors would not bar her right. But in *Kittera's Estate*, 17 Pa. St. 416, the point is directly decided. It was there held that distribution of an estate of a decedent in the orphans' court is, under the act of assembly, to be made "to and among the persons entitled to the same"; that the right of each creditor to be heard in support of his claim and in ⁶⁹⁷ opposition to every claimant who interferes with it is necessarily involved in the right to demand payment out of the fund. "Each creditor or claimant has a right to appear and to be heard, so far as may be necessary for the protection of his own interest; and of this proceeding the administrator has not the control, nor is he responsible for errors in the distribution so decreed. At a time when the statute of limitations was not in favor it was held that an executor or administrator was not bound to plead it. This was only applicable to actions in which the personal representative of the decedent was intrusted with the management of the defense, and in which the pleading was necessarily regulated by his own discretion. It has no place in a proceeding before the orphans' court. . . . It follows that when the fund is not sufficient to pay all, each creditor has a right to oppose any other claimant, by showing payment of the debt or that it is barred by the statute of limitations." This was followed by *Hoch's Appeal*, 21 Pa. St. 280, and *Ritter's Appeal*, 23 Pa. St. 95. In this last case it was said that where the personal representative had in good faith actually paid a debt barred by the statute, without protest by legatees or creditors, equity would not refuse him credit therefor in his account. But it was expressly decided he could not bar distributees from pleading the statute by refusing to plead it himself.

It will be seen from these most explicit decisions that the personal representative is not answerable for a cause of action not created by the decedent; that if by a new promise he revive a debt already barred, or prolongs the life of one not yet barred, the contract is his own, and he is personally answerable. And, although he is not bound to plead the statute where he believes the debt unpaid, yet in the distribution of a fund, creditors whose interests are affected can plead it. Where, however, a suit is brought against him in his representative capacity on a debt barred by the statute, and he waives his right to plead it, the

judgment is *de bonis testatoris*, and cannot be questioned thereafter on distribution of the estate.

It is argued that to disallow the bank's claim is to question collaterally the conclusiveness of a judgment of the common pleas. But this is a mistake. An inspection of the record shows it is not a judgment against the estate, but against the executors personally; and assuming the executors could have, ⁶⁰⁸ by that form of proceeding, bound the estate, they framed no warrant to any attorney to confess such a judgment. It is not questioning a judgment collaterally to ascertain from the record against whom it is rendered, and whether it can be legally paid out of the fund for distribution.

We think it was error to not sustain the plea of the statute preferred by this appellant, therefore, the decree of the court below is reversed so far as it awards part of the fund to the appellee, and it is directed that as the entire fund does not pay the amount allowed on appellant's claim the whole fund be paid over to her. And, further, that appellee pay the costs of this appeal.

EXECUTORS AND ADMINISTRATORS—POWER TO BIND ESTATE—STATUTE OF LIMITATIONS.—An action at law will not lie against an administrator or executor as such, though upon a contract made by him for the benefit of the estate, and the liability of an administrator or executor upon such a contract is personal though it is in writing and he purports to execute it in his capacity as executor: Monographic note to *Schlicker v. Hemenway*, 52 Am. St. Rep. 121; *Pike v. Thomas*, 62 Ark. 223; 54 Am. St. Rep. 292. And the decided preponderance of authorities denies the personal representatives of the decedent the power, by an acknowledgment or new promise, to revive an obligation against which the statute of limitations had completely run in their lifetime: Monographic note to *Schlicker v. Hemenway*, 52 Am. St. Rep. 123, on the liability of estates of decedents upon contracts and for torts of executors and administrators.

JUDGMENTS—COLLATERAL ATTACK UPON—WHAT IS.—A collateral attack upon a judgment or decree is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying it: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and monographic note thereto. To attack a judgment for invalidity shown by the record itself does not constitute a collateral attack, though not in a direct proceeding to reverse, annul, or set aside such judgment: *Bailey v. Bailey*, 41 S. C. 337; 44 Am. St. Rep. 713.

JUDGMENT BY CONFESSION—WARRANT OF ATTORNEY.—A warrant of attorney to confess judgment must be strictly construed: *Spence v. Emerine*, 46 Ohio St. 433; 15 Am. St. Rep. 634, and note. See, also, *Little v. Dyer*, 138 Ill. 272; 32 Am. St. Rep. 140.

KULP v. MARCH.

[181 PENNSYLVANIA STATE, 627.]

INSURANCE—LIFE—ASSIGNMENT OF.—If it appears in evidence that an insured during his lifetime had executed a regular assignment in writing and under seal to his wife of insurance policies on his life, and that when on his deathbed he informed witnesses that he had transferred his life insurance to his wife, requesting his brother to get such insurance as soon as possible, as his wife would need the money, and stating that the assignment and policies were in his safe among his private papers, where they were found after his death in an envelope with his wife's name indorsed thereon, the evidence is sufficient to authorize a finding or verdict of an assignment of the policies and a sufficient delivery thereof.

Interpleader by a widow as plaintiff to determine the ownership of certain policies of life insurance. Judgment for defendant. Plaintiff appealed.

M. Evans, N. H. Larzelere, and H. M. Brownbank, for the appellant.

M. D. Evans, F. March, and J. H. Maxwell, for the appellee.

630 GREEN, J. In considering the question at issue in this case, it must be carefully borne in mind that the deceased, Henry G. Kulp, had formally executed a regular assignment in writing and under seal, to his wife, the plaintiff, of all the policies of life insurance involved in the present contention. It was a perfect instrument, and carried all his interest in the policies, naming each one of them by a full description, and it was regularly signed and sealed, and subscribed by an attesting witness. In its terms it was an absolute assignment and transfer without any qualification or condition whatever; it was expressed in the present tense, and was as efficacious to pass the whole title of the assignor as any deed in fee simple for real estate could possibly be. There is not a solitary question as to its legal efficacy except the question of delivery, and that question only arises in view of its character as a gift. But in its aspect as a gift it has certain attending circumstances and surroundings, which tend greatly to narrow the limits of the inquiry, and to give it a special character not usually incident in this class of cases. For instance, it is not the case of a parol gift of a chattel, or of a security, where there can be no pretense of the passage of the title, unless the thing given is actually produced and handed over to the donee. In all that class of cases, and they are by far the most numerous, the corporeal tradition of the gift is the very essence and foundation of the title. It is that alone which passes the title, and hence it must exist or no title passes. But here there is no question as to the intent of the donor to transfer all the title he 631 had, to the donee, and

no evidence is required on that subject. He has actually done so in the most efficient manner possible. In all such cases, the question of delivery is of far less significance and importance than it is in all the cases where the physical delivery is the means of transmutation of the title. There the physical delivery must actually take place or there is no change of title. But where the title has been actually conveyed by a solemn instrument of writing, duly executed and sealed, the question is rather as to the delivery of the instrument than the delivery of the substance of the gift. And, as is well known to the profession, the delivery of the instrument presents a very different question from the delivery of the subject matter of the instrument. It is largely a question of intent. It may be accomplished without the instrument being handed to the grantee at all. It may be left with other persons or at a certain place, and its proof may be established by the verbal declarations of the grantor. In the case of a deed for land, if it be placed on record by the grantor, that alone is sufficient evidence of delivery, though the deed itself was never handed to the grantee. Then, too, it is a question in this case of a delivery by a husband to a wife. It is well settled that the possession by the husband of his wife's deeds and securities is regarded by the law as consistent with a possession in her, and very slight evidence of such a possession is sufficient to vest her title.

Some of the authorities illustrating the foregoing statements are as follows: In *Jacques v. Fourthman*, 137 Pa. St. 428, we held that when the plaintiff claimed property in notes as a gift from her deceased brother, and proved her possession of them immediately after his death, with evidence of acts and declarations of the deceased in his lifetime and other circumstances appropriate to a gift of them, as alleged, it was error to refuse to submit the question of fact as to the delivery to the determination of the jury. In this case, there was no assignment of the notes to the plaintiff, and there was no proof of their actual delivery. But there was some proof that they were at least in the custody of the plaintiff, and certain declarations of the deceased relating to them we held to be sufficient to carry the question of delivery to the jury. We said, 'What did the decedent mean when he said, 'Julia where are those notes I gave you?' Did he mean that he had given them to the plaintiff? ⁶³² Certainly, the court cannot say, as a matter of law, that he did not. The word used was entirely appropriate to express the fact of the gift. The actual meaning of the declarant must be determined by the jury, and if they decided that a gift was meant, could they not lawfully do so?

Would such a meaning be an absolutely illegitimate inference? We cannot say so."

In *Reese v. Reese*, 157 Pa. St. 200, we held that the transfer of a judgment by a husband to a wife at a time when the husband is out of debt is a valid gift. The consideration of natural love and affection will sustain it although no money is paid for it. We held, also, that the subsequent declarations and misrepresentations made by the husband in order to procure goods would not affect the wife's title if she was not a party to them.

In *Livingood's Estate*, 167 Pa. St. 191, the decedent gave to his wife a mortgage and judgment bond which he held against his brother, directing her to deliver them to the brother. The securities were delivered to the brother, who returned them to decedent's wife, with a request that she should keep them for him. They were then placed in a box in which decedent kept his securities. Decedent repeatedly declared it to be his intention to forgive the debts for which they were given, and, in a paper requesting his brother to make oath to a tax return, stated that the judgment and mortgage against his brother were satisfied. Held, that the evidence was sufficient to sustain a finding that these debts had been forgiven by the decedent. There was no assignment or transfer of the securities, and after the death of the decedent they were found in his own box and amongst his other securities. Yet we held the parol testimony sufficient to sustain the gift.

In *Gish v. Brown*, 171 Pa. St. 479, we decided that where a father delivered a deed to a third person with absolute direction to hold until his death, and then deliver it to his son who was the grantee in the deed, a delivery to the son after the grantor's death by the custodian of the deed passed a good title to the son. By the verbal testimony it appeared that the grantor put the deed and a bond from the grantee to him for fifteen thousand dollars and another agreement between the father and son into an envelope which he sealed and then delivered it to the third person, saying, "I will make a deed for the place to Henry. I will give this to you [Rutt] to hold." He said also that the farm should ^{be} Henry's, and after he handed the papers to Rutt he said, "Now the farm is gone," and instructed Rutt to hold the papers until after his death and then to give them to his son Henry. The court below left the question of delivery to the jury and we sustained the court in so doing.

In *Wagoner's Estate, Dorian's Appeal*, 174 Pa. St. 553, 59 Am. St. Rep. 828, the facts were that a niece kept house for her uncle during the last fifteen years of his life. She did the household

work, took care of cows, and worked in the garden. About eighteen months before the uncle's death he called on a justice of the peace and executed a bond in favor of his niece in the sum of two thousand dollars payable to her absolutely in one year with interest at the rate of five per cent, with a warrant of attorney appended. The bond was handed to the justice to be kept by him and delivered to the niece after the uncle's death. Some time after the bond had been deposited with the justice the uncle told his niece that there was a bond of two thousand dollars at the squire's, and that she was to leave it there as long as he lived, and at his death she was to go and get it. A few days after the uncle's death the niece called for the bond, and the justice gave it to her. We sustained the bond as a gift, and held there was a sufficient delivery to execute the gift to the niece, and that the contingency that the gift was not to take effect except in case of the survivorship of the niece did not render it void.

In *Malone's Estate*, 8 Week. Not. Cas. 179, the instrument in question was a life insurance policy which was made in the name of the husband before marriage, but was claimed by the wife after the husband's death. There was no assignment of the policy to the wife, but there was proof of declarations of the husband that he had given the policy to his wife. It was found after his death in the safe of the firm of which he was a member, and he had represented to his creditors that he owned the policy. The court below said: "The delivery may be proved by the declaration of the donor, just as the gift itself may be; and when the donor declares that he had given it at a previous time, and that the donee had then become the owner, it is implied that delivery, and, indeed, every other formality necessary to create a complete gift, had taken place. The law always presumes knowledge of its requirements." This case was affirmed by this court in 38 Leg. Int. 303, not reported in state reports.

⁶³⁴ In *Osterhout's Estate*, 148 Pa. St. 223, the court below charged as follows: "It is contended here on the part of the counsel for the plaintiff that a gift cannot be proven by the declarations of a donor made at a time different from that when it is claimed that the gift was made, but we say to you that a gift may be proven by the declarations of the donor, and if you believe that Mr. Osterhout said to R. T. Handrick that he had given these bonds to Eugene Handrick, and you credit that testimony, you may find from his declaration that he had at some time previously given these bonds to Eugene S. Handrick, the defendant." This court held on appeal that the evidence was for the jury.

In *Sourwine v. Claypool*, 138 Pa. St. 126, a daughter claimed

that a certain sum of four hundred dollars which had been contributed by her father to her husband in the purchase of some land by the latter, and which was subsequently sold by the sheriff and purchased by the father, had been advanced originally by him as a gift to her. The evidence in support of the claim consisted of declarations by the father, made to strangers, of his having given this money to his daughter. The verdict was in her favor, and the defendant claimed that the admissions of the donor were not sufficient evidence to prove the gift. Clark, J., delivering the opinion of this court said: "This is not a case where the plaintiff seeks to establish a parol gift or sale of land, and the deliberate admissions of the decedent, if they are sufficiently clear, full, and precise, and relate to existing facts, and not to a mere intention, are competent to establish the fact."

In view of the provisions of the act of April 15, 1868 (Pub. Laws, 103), in relation to life insurance policies assigned by husbands to their wives, it may well be contended that the policy of our law favors such transactions, even where the rights of creditors may be affected. The words of the act are as follows, "All policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been or shall be taken for the benefit of, or bona fide assigned to, the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative full and clear from all claims of the creditors of such person." The assignment of the policy in such a case is alone sufficient to vest the title in the wife, even as against creditors, if it is bona fide. As there is not the least question as to the bona fides of the assignment ⁶³⁵ in this case, that requirement of the act is fully complied with.

In regard to the possession of the papers, we said in *Turner v. Warren*, 160 Pa. St. 343: "That a husband should place his wife's papers in his safe, and that they should remain there until his death, needs no explanation, for it is entirely free from suspicion or doubt. As between strangers, it would be improbable that the grantee in a deed would permit it after delivery to remain in the possession of the grantor. It is not so, however, where the grantee is the wife of the grantor, and he has a safe for the keeping of valuable papers. Care would in such case prompt the wife to deposit the deed in her husband's safe." In *Thornton on Gifts*, section 169, the author says: "The relation of husband to wife is so close, and their every-day life is so blended, that it is often difficult to tell when the husband has perfected a gift to his wife by delivery. The law takes cognizance of these rela-

tionships, of the daily contact of such donor and donee, of the blending, as it were, of their daily walks and acts, and will construe an act to amount to a delivery where it often would not if the donor and donee were not members of the same family. The law does not dispense with an actual or constructive delivery, but it accepts the acts of the donor, if a clear intent to give is shown, as amounting to a delivery, when it would not do so if the donor and donee occupied separate habitations and were not members of the same family." It was said in *Malone's Estate*, 8 Week. Not. Cas. 179: "If a valid gift was made, it is of no importance, as between husband and wife, that the former subsequently became the custodian. In such case he holds as trustee without the right to divest his wife's ownership."

Bearing in mind the principles and distinctions heretofore stated, and the fact that the assignment of the policies is absolute on its face, and transfers all the interest of the husband to the wife, and considering also that relation as between these parties, let us review the testimony on the subject of delivery. The wife being incompetent to testify as to what took place between her husband and herself, allowance must be made for that circumstance in considering the effect of the whole of the testimony.

Mr. Henry M. Brownbank, a brother of Mrs. Kulp, was examined on the trial and testified that he was with Mr. Kulp on ⁶³⁶ Sunday evening before he died on the Tuesday following, and had a conversation with him. He said there were two conversations, at the first of which Dr. Maya, Mrs. Kulp, his mother, Mrs. Brownbank, and himself were present. He said, "I was sent for and came over to his bedroom. He was lying on the bed. I sat down on the other side of the bed and he said to me, 'Harry, I transferred all my life insurance, amounting to over thirty-two thousand dollars, to Aida. The policies are in my safe with my private papers. I want you to get the insurance as soon after my death as you can, as Aida will need money.' . . . After his death, in consequence of that direction, I went to secure these policies and found the policies. . . . Mr. Kulp had in his possession other property of his wife's at the time of his death."

Mrs. Ellen Brownbank, the mother of Mrs. Kulp, was also examined and testified that she was present at the time spoken of by her son, and heard what was said. "He said he had transferred his life insurance all to Aida, and he said that Harry should get the insurance as soon as he could, because Aida would need money. . . . She was in the room all the time at that

time: Mr. Kulp did not say anything to me. He said it to Harry. Harry was sitting on the bed with his hand in his, and he was talking to Harry. I heard it. . . . He said, 'My policies are in the safe among my private papers.' He said, 'I want you to get the insurance as soon as you can, because Aida will need money. . . . Preceding that he said, 'I transferred all my life insurance to Aida, amounting to over thirty thousand dollars, and the policies are in my safe among my private papers.'"

There was no contradiction of the foregoing testimony, and, as the court below took it all away from the jury, it must be assumed to be true. Upon that assumption several considerations arise, all of which would have been for the jury. The assignment was found in the safe after Mr. Kulp's death by Mr. Brownbank. It was inclosed in a sealed envelope. Mr. Brownbank said as to that, "Have in my hand the assignment that has been offered in evidence and an envelope. The assignment was inside of the envelope. The envelope was in Mr. Kulp's private safe in his counting room in Pottstown. With this assignment were the policies so far as I recall it. . . . I took it [the envelope] and opened it; found it had my sister's name indorsed upon it; opened it and found that it was the assignment." 637 From all the testimony it is obvious that Mr. Kulp intended to assign and transfer the policies to his wife absolutely, because that is just what he did do, when he executed the assignment. When he said he had transferred all his policies to his wife, he spoke of it as a past fact, and thereby implied that he had done all that was necessary to make a good legal transfer. And when he said to his wife's brother, in the presence of his wife, that the policies were in his safe among his private papers, and he wanted his wife's brother to get the insurance money as soon as possible, because his wife would need money, did he not then and there authorize his brother to take possession of the policies and get the money due on them for her and pay it over to her? When she tacitly acquiesced in this arrangement, in the presence of her husband, was there anything wanting to complete the delivery of a chose in action, the absolute title to which had already been formally assigned and transferred to her? We think not, and we think that the jury would have been justified in inferring such a delivery of the assignment and the policies as would sustain such a transfer. Nor do we think, in view of the fact that it was his own wife to whom the formal deed of assignment and transfer had been already made, that there was any inconsistency in the fact that the papers were kept in his private safe. It was

a very proper place for them to be, and no necessary inference of a nondelivery flows from that fact. All the facts relating to that subject were in parol and were proper for the consideration of the jury. They were entirely consistent with the theory of a previous delivery, and indeed they were very inconsistent with any theory that the title to the policies still remained in the husband. Great force is added to this by his positive direction to his wife's brother, in her presence, that he should get the insurance money as soon as possible and pay it over to his wife. How could such a direction be reconciled with the idea that he still regarded himself as the owner of the policies, and, therefore, that the money should be paid to his executors, and a large part of it go to other persons than his wife. We are clearly of opinion that the question should have been submitted to the jury upon all the evidence, with instructions that they should find for the plaintiff if they found a delivery of the assignment or the policies. The assignments of error are sustained.

Judgment reversed and venire de novo awarded.

INSURANCE—ASSIGNMENT OF POLICY.—A husband may orally assign a policy of insurance on his own life to his wife: *Chapman v. McIlwrath*, 77 Mo. 38; 46 Am. Rep. 1. See extended note to *Currier v. Continental Life Ins. Co.*, 52 Am. Rep. 143-148, and monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 564-568. An assignment may be valid without actual delivery to the assignee during the assignor's lifetime: *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

POLLOCK v. BUILDING AND LOAN ASSOCIATION.

. [48 SOUTH CAROLINA, 65.]

CORPORATION, FOREIGN, SERVICE OF PROCESS UPON.
In South Carolina, service of summons may be made on a foreign corporation, when it has property within the state, or when the cause of action arose therein, by delivering such summons to any of its resident agents, and, where the corporation has held out a person as its agent, it will not, for the purpose of avoiding service of process made upon him, be permitted to prove that he was not its agent, or, though its agent, that his powers were special and not such as to justify the service of process upon him.

CORPORATIONS.—WHERE THE SERVICE OF PROCESS ON A FOREIGN CORPORATION may be made upon its agent, it is sufficient to constitute one such agent that he conducted the transaction out of which the action arose, and, if the corporation is a foreign insurance company, service may be made on its local agent who had authority to issue policies, collect premiums, pay losses, etc.

CORPORATION, FOREIGN, APPOINTMENT OF RECEIVER FOR, WHETHER TERMINATES RIGHT TO SERVE PROCESS UPON AGENT.—The appointment of a receiver of the assets of a corporation within the state of its residence does not terminate the authority of an agent of the corporation resident in this state. Therefore, summons issued here against the corporation may be served upon such agent after, as well as before, such appointment.

PRACTICE.—TO SUSTAIN A DEMURRER FOR WANT OF JURISDICTION, the complaint must affirmatively show that some fact essential to jurisdiction does not exist. If residence of the plaintiff within the state is necessary, it will be presumed until the contrary is alleged.

BUILDING AND LOAN ASSOCIATIONS, RIGHT TO RECOVER FOR PAYMENTS TO.—A complaint alleging the making of a loan by a building and loan association and the execution in its favor of a note and mortgage, that a specified sum resulting from the collection of insurance on the mortgaged premises was paid into a bank, with the understanding that it would pay to the association the amount due it when that amount was ascertained and the balance to the plaintiff, but that the association demanded and the bank paid a sum greatly in excess of that due, states a cause of action against the association and the bank, though such excess resulted from the exaction of usurious interest.

PRACTICE—JOINDER OF CAUSES OF ACTION.—Under a statute permitting plaintiffs to unite several causes of action when all arise out of the same transaction, or transactions connected with the same subject matter, a complaint against a banking corporation and a building and loan association alleging the payment of a sum of money to the bank out of which it undertook to pay the association the amount due it as soon as such amount was ascertained, but that, without waiting for such ascertainment, it paid the association a much greater sum, states causes of action arising out of the same transaction, and therefore is not subject to demurrer for misjoinder of causes of action.

W. F. Stevenson and R. T. Gaston, for the appellants.

Edward McIver and Pollock & Pollock, contra.

⁶⁷ BUCHANAN, J. This was an action begun on the twenty-ninth day of July, 1895, by the service in Cheraw, South Carolina, of the summons and complaint on A. G. Kollock, who, it is contended, was the resident agent of the Carolina Interstate Building and Loan Association of Wilmington, North Carolina, and by service on the same day on the Bank of Cheraw. The Bank of Cheraw demurred to the complaint, and the building and loan association, appearing only for that purpose, served a notice on the attorneys for the plaintiffs of a motion to set aside the service of the summons and complaint, and dismiss the proceedings as to it, on the ground that it had not been brought under the jurisdiction of the court by proper service. At the September term (1895) of the court of common pleas held for Chesterfield county, this motion was heard by his honor, Judge Ernest Gary, and refused. Notice of intention to appeal was duly served, but it was agreed among counsel that, pending this appeal, the building and loan association might "make and argue any demurrers, oral or written, which it may be advised to make, at the February term for 1896 of this (circuit) court, without prejudice to any of its rights under said appeal." At the February term (1896), both the Bank of Cheraw and the building and loan association interposed and argued demurrers and motions to dismiss the complaint. The demurrer raised the question of the alleged misjoinder of two distinct causes of action, and the motions to dismiss the complaint were made on ⁶⁸ the ground that it did not state facts sufficient to constitute a cause of action, in that the plaintiffs, as purchasers of land covered by mortgage, could not plead usury in the terms of the mortgage; and, further, by the Bank of Cheraw, that the complaint showed that no cause of action could arise against it until the cause of action against its codefendant was adjudicated. His honor, Judge Watts, overruled the demurrers and motions to dismiss, holding that the plaintiffs could not plead usury, not being

parties to the original contract, but that there were sufficient allegations in the complaint to show, if true, that the building and loan association had collected too much money from the plaintiffs, under the contract made by said association with Mrs. R. J. Pollock, the grantor of plaintiffs, when the contract was properly construed and the debt properly computed, and that the complaint charged that the Bank of Cheraw was a participant in such collection. Both defendants appealed. By consent of counsel, all the appeals growing out of this case were heard together.

The appeal from the order of his honor, Judge Ernest Gary, is brought upon the following exceptions: 1. Because the court erred in holding that the court had obtained jurisdiction of the Carolina Interstate Building and Loan Association by mere service on A. G. Kollock; 2. Because the court erred in holding that the agreement constituting A. G. Kollock agent to solicit stock was a valid agreement made by said association, and constituted him such a resident agent as could be served; 3. Because the court erred in holding that said so-called agreement had not terminated when the association ceased to issue stock; 4. Because the court erred in construing the by-laws of said association to mean that A. G. Kollock, as treasurer of the local branch association, was agent of the said defendant association, in the face of section 5, article 9, of said by-laws; 5. Because the appointment of a receiver by the court of North Carolina for said corporation, and the taking possession of the assets of said corporation by said receiver under ~~the~~ said order, terminated the right of A. G. Kollock to act as said agent of the corporation, even if he had been such agent, and the court erred in not so holding; 6. Because the court erred in holding that any agent of the said corporation (being a foreign corporation) could be served if he resided in the state, and the service would be legal; 7. Because the court erred in holding that service could be made here on a foreign corporation, through any resident agent of the same, without the attachment of any property; 8. Because the court erred in holding that A. G. Kollock was the resident agent of the said corporation at the date of the service of the summons; 9. Because the court erred in holding that the said defendant could be served here, although it had no property here in this state, and the cause of action did not arise in this state, without serving the agent specially appointed by said defendant to accept service; 10. Because it does not appear that the court has acquired jurisdiction of the defendant corporation, or that plaintiffs have a right to sue said corporation in this state, and the court erred in

not so holding; 11. It does not appear that the plaintiffs are residents of this state, or that the cause of action arose in this state, and the court erred in not dismissing the action for want of jurisdiction; 12. Because the court erred in holding that A. G. Kollock had been properly appointed local agent of said association, and that said appointment was signed by E. S. Tennant, secretary, and he had no authority to appoint any agent, as appears from article 7, section 1, of the articles of incorporation of said corporation.

The grounds of appeal from the order of Judge Watts, on behalf of the building and loan association, are as follows: 1. Because the circuit judge erred in holding that the complaint in this action could be construed to be for money wrongfully collected, in violation of a contract of the Carolina Interstate Building and Loan Association with R. J. Pollock, not collected as usurious interest, when plaintiffs expressly alleged that all the money claimed by them ⁷⁰ to have been wrongfully collected was collected as usurious interest; 2. Because the court erred in holding that the complaint contained sufficient allegations as to this defendant to show, if true, that more money had been collected by the Carolina Interstate Building and Loan Association than was due on its contract, even if the plea of usury was not allowed; 3. Because the court erred in holding that plaintiffs, in their complaint, stated, or attempted to state, any other cause of action against this defendant than one to recover usurious interest paid and the penalty therefor, and in not dismissing the complaint, when he held that these plaintiffs could not plead or set up usury; 4. Because no cause of action was stated to this defendant, and the court erred in not dismissing the complaint, on its motion, on that ground; 5. Because the court erred in not holding that that complaint showed on its face that the said building and loan association had accepted less than was actually due it under its contract, and in not dismissing the complaint on that ground; 6. Because the court erred in holding that the two causes of action attempted to be stated in the complaint were properly joined; 7. Because the court erred in holding that both of the alleged causes of action affected all the parties to the said action or all the defendants.

On behalf of the Bank of Cheraw, the following grounds of appeal from the order were taken: 1. The circuit judge erred in holding that the alleged cause of action against its codefendant and that against this defendant were properly joined in the complaint; 2. He erred in not holding that it appeared from the face of the complaint that no cause of action arose against

this defendant until the liability of its codefendant to the plaintiff had been first "determined and adjusted"; 3. He erred in holding that as the complaint charges the Bank of Cheraw with being a participant, "to a certain extent," in collection of the money received by its codefendant, it states a present cause of action against it; 4. He erred in holding that complaint stated a cause of ⁷¹ action against this defendant, when no legal obligation is alleged—no demand made or refusal on its part, and no allegation in complaint that this defendant was not ready and able to respond to any liability it had assumed whenever same accrued; 5. Having eliminated the question of usury from the case, he erred in not holding that the complaint does not state any liability on the part of the Carolina Interstate Building and Loan Association to the plaintiffs, and consequently could allege no cause of action against this defendant; 6. He erred in refusing to sustain the demurrers of this defendant and in not dismissing the complaint.

The appeal from Judge Gary's order raises substantially two questions: 1. Can the court of common pleas acquire jurisdiction of a foreign corporation without attachment? 2. Was the service upon the person of A. G. Kollock a valid service upon the Carolina Interstate Building and Loan Association? We will discuss these questions in their order. Can jurisdiction be obtained over a foreign corporation without attachment? Section 155 of the code provides for service against the corporation by delivering a copy of the summons "to the president or other heads of the corporation, secretary, cashier, treasurer, a director, or agent thereof." The second paragraph thereof provides for service in respect to foreign corporations "only when" such corporation "has property within the state, or the cause of action arose therein, or where such service shall be made in this state personally upon the president, cashier, treasurer, attorney, or secretary, or any resident agent thereof." Let us analyze these alternative services: 1. Such service can be made in respect to a foreign corporation when it has property within the state; 2. Such service may be made in respect to a foreign corporation when the cause of action arose within the state; 3. And such service shall be made in respect to foreign corporations where such service is made in this state personally upon the president, cashier, treasurer, attorney, or secretary, or any resident agent thereof. It is to be noted ⁷² that only in one of these modes of service does the matter of property figure as an essential. In that one, it rather gives the power to make such service, rather than specify the particular manner of effectuating the purpose.

It merely declares that service may be made when such foreign corporation has property within the state. The manner of such service, by attachment and advertisement or otherwise, is not material. In the second division, the manner of service is also not mentioned. Remembering that at common law there was no personal service on a foreign corporation, the legislature clearly contemplated the manner of service that at the adoption of the code was usual and appropriate in such cases (see sec. 156), unless personal service within the state could be made "upon the president, cashier, treasurer, attorney, or secretary, or any resident agent thereof." Plainly, therefore, the manner of service was extended. It became no longer necessary (although permissible) to serve by publication and attachment, for the president, cashier, treasurer, attorney, or secretary or any resident agent of the defendant foreign corporation could be served within the state; personal service upon such officers within the state was to be considered as personal service upon such corporation, to the same binding effect and force and efficacy as if the defendant had been a domestic corporation served within the state. This view is supported by the cases of *Hester v. Rasin etc. Co.*, 33 S. C. 609; *Tillinghast v. Boston etc. Co.*, 39 S. C. 484, and the recent case of *Littlejohn v. Southern R. R. Co.*, 45 S. C. 96. It is noted that the complaint here alleged that the defendant building and loan association was owning property and doing business in the state; there was no error here.

Was the service by delivering a copy of the summons upon A. G. Kollock at Cheraw on the twenty-ninth day of July, 1895, a valid service upon the Carolina Interstate Building and Loan Association? Was the said A. G. Kollock a resident agent of the said corporation? If the said Kollock was not a resident agent of the said corporation, therefore, did ⁷³ the appointment of a receiver of such building and loan association by the courts of North Carolina terminate such agency? The complaint alleges "that the Carolina Interstate Building and Loan Association is now and was at the time hereinafter mentioned a corporation duly chartered under and by the laws of the state of North Carolina, and owning property and doing business in the state of South Carolina, county of Chesterfield, and that A. G. Kollock, of Cheraw, is the duly constituted and appointed resident agent thereof, as plaintiffs are informed and believe." The Code of Procedure, section 155, provides that "the summons shall be served by delivering a copy thereof, as follows: Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose

therein, or where such service shall be made in this state personally upon the president, cashier, treasurer, attorney, or secretary, or any resident agent thereof." The trial court found as a matter of fact that A. G. Kollock was a resident agent of the defendant association, and his finding on this question cannot be reversed by this court: *Hester v. Basin etc. Co.*, 33 S. C. 609. The code does not draw any distinction between the different classes of agents; it contemplates "any resident agent," as an appropriate one to be served. In this case Kollock was a soliciting agent, a director in the local board in Cheraw, receipted for and remitted all installments, fines, dues, and was paid a regular commission. He had a standing yearly advertisement in the *Cheraw Reporter*, over his signature as agent, and the association paid him each year for the same. The very negotiations for the loan out of which this case arose were had with Kollock. Having held Kollock out as its resident agent with full powers, it would be monstrous to now permit it to set up the plea that if he was an agent at all, it was an agency of limited powers, and did not extend to the transaction out of which this case arose. Courts will not give sanction to a doctrine that a corporation in such ⁷⁴ a manner can deny the power of an agency when an advantage is to be obtained by such denial, and share in the fruits of a contract when it is to its interest to consider such contract binding. "Generally, service on an agent may be sufficient if the person was the agent conducting the transaction out of which the suit arose." Again, "generally service may be made on a local agent of a foreign insurance company whose business it is to issue policies, collect premiums, pay losses, etc.": See 22 *Am. & Eng. Ency. of Law*, 130, 131. Certainly the circuit judge was amply justified by the evidence. It is only necessary to say here, in passing, that the designation of a particular person, as required by Revised Statutes, section 1466, upon whom service may be made, and service upon the same is not exclusive of, but in addition to, the other modes of service: *Littlejohn v. Southern R. R. Co.*, 45 S. C. 96.

Did the appointment of a temporary receiver of the defendant association by the North Carolina state court, a few days before the service in this state, render such service invalid? Such a receiver has (says the United States supreme court, in *Booth v. Clark*, 17 How. 338) "no extraterritorial power of official action, none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the

principles of comity, a privilege to sue in a foreign court or any other jurisdiction." "Receivers appointed by one jurisdiction are not entitled as of right to recognition in other jurisdictions, and courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers": 20 Am. & Eng. Ency. of Law, 65, 66. "The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him": Gluck & Becker on Receivers, 3. In *Dial v. Gary*, 14 S. C. 573, 37 Am. Rep. 737, our court held that an administrator appointed by the courts of Massachusetts had no legal capacity to sue in this state, and that his assignment of the bond and ⁷⁵ mortgage to a citizen of this state did not give the latter capacity to sue: See *Paterson v. Pagan*, 18 S. C. 584. This is supported by reason, and the jurisdiction and the power exercised by courts. A court deriving its power from the laws of North Carolina cannot confer any greater power than it is given. Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator. The stream cannot rise higher than its source. "A corporation is not dissolved, ipso facto, by the appointment of a receiver": 20 Am. & Eng. Ency. of Law, 278. If this doctrine applies to the appointment of a permanent receiver, with how much greater force does it apply to the appointment of a temporary receiver?

The exceptions (10 and 11) allege that inasmuch as the complaint does not show that the plaintiffs are residents of this state, the court did not acquire jurisdiction of the cause. As preliminary to the consideration of this ground, it should be remembered that the court of common pleas is a court of record, of general jurisdiction, of full and ample powers, and in no sense a court of inferior or limited powers. Certain presumptions attend the record and proceedings of the former, while to give jurisdiction to the latter, their jurisdictional facts must affirmatively appear. The record does not show that the plaintiffs are not residents of this state, nor does any matter appear negating the presumption in the premises. Plaintiffs have a right to exhibit action, without amending the complaint exhibited by them, that they are residents within the state: *Chafee v. Postal Tel. Co.*, 35 S. C. 372. To sustain a demurrer upon such grounds, the proof of want of jurisdiction must appear on the face of the complaint. Here the complaint certainly does not show that the plaintiffs are not residents of the state: See *Drake v. Steadman*, 46 S. C. 490, 491. We think that Kollock was a resident agent

of the defendant association, and that such corporation was properly served, and that such ⁷⁶ service was binding upon it. Judge Gary's order is sustained.

Second appeal. The exceptions of the building and loan association to Judge Watts' order, seven in number, and the exceptions of the Bank of Cheraw, six in number, raise three questions, and, for convenience, will be considered under as many headings.

1. Admitting that the plaintiffs cannot recover on the ground of usury alone, does the complaint state facts sufficient to constitute a cause of action against either or both of the defendants? Let us examine the allegations of the complaint. Upon this inquiry all the allegations are admitted to be true. Has any fact been omitted, the insertion of which was necessary to constitute a cause of action? It appears that on the fifth day of February, 1892, Mrs. R. J. Pollock, the assignor of the plaintiffs, became a stockholder in the defendant association, having subscribed for fifteen shares of its investment stock, and from that time to the tenth day of September, 1892, paid into the association the sum of \$88.50. On the fifth day of October, 1892, she borrowed from the association on the assignment of her shares, and her bonds secured by a mortgage on her house and lots in Cheraw, the sum of \$1,500. The condition of her bond was that she should pay to the association the sum of \$25 per month, until the said shares of stock should have matured to their par value of \$100 each; "provided, that if she failed to pay said monthly installments for ninety days from the time same became due, then the whole of said borrowed sum of \$1,500 should become due, with interest, at the rate of six per cent per annum." On the eighth day of February, 1893, she conveyed the property mortgaged to plaintiffs, who assumed her contract; plaintiffs insured the property for \$2,500. From the fifth day of October, 1892, to the fifteenth day of June, 1893, plaintiffs and their assignor paid to the association on the bond and mortgage \$535.50. On the tenth day of October, 1894, the house was burned. The agent of the insurance company ⁷⁷ thereafter soon called on plaintiffs' attorney in fact, with a check in favor of plaintiffs for \$2,500; the plaintiffs' attorney in fact and the insurance agent went to the Bank of Cheraw, and by the binding agreement of all parties the check was, upon the surrender of the insurance policy by the bank, indorsed by the plaintiffs' attorney in fact, and deposited in the Bank of Cheraw, with the distinct understanding and agreement on the part of the bank to hold enough of the same to pay the balance due to the association when the amount due was deter-

mined, and to pay the balance to the plaintiffs. The association immediately demanded of the bank the sum of \$1,293.43 in satisfaction of its bond and mortgage, although that was largely in excess of the amount due, and that the bank, without plaintiffs' knowledge, without waiting to ascertain the amount due, and in plain violation of its agreement to hold the same until it could be definitely ascertained what amount was due, paid the defendant association on the fourteenth day of January, 1895, the sum of \$1,293.43, and delivered the bond and mortgage up to plaintiffs. The association has collected on the bond and mortgage the sum of \$1,917.42, not including interest on payments made, and the same is largely in excess of the amount due on the bond. The money was borrowed on the fifth day of October, 1892, and the last payment was made on the fifteenth day of June, 1894.

The plaintiffs stand here in the place of Mrs. Pollock, and they must comply with her contract. While they cannot plead usury against it, having alleged that the amount collected was largely in excess of the amount due, are the allegations and general scope of the complaint broad enough for them to obtain other relief? Under this complaint can they demand a proper construction, and by such construction, if favorable, cannot judgment be entered up for the amount claimed to be due? Presumably, the complaint was drawn principally to recover usury paid. Notwithstanding this fact, however, if under this complaint ⁷⁸ any cause of action is stated, the court below will be sustained. Surely, it cannot be successfully contended that the plaintiffs would have no remedy if the association had obtained possession of \$5,000, \$10,000, or any amount in excess of amount due, and applied it to the satisfaction of the bond and mortgage. No monthly payments were made by the plaintiffs after the fifteenth day of June, 1894. Payments then stopped. Who could take advantage of the forfeiture on failure to make these payments for ninety days? Did the association have this right? If so, why did they allow six months to pass? If they had the right to insist on such forfeiture, was it not to be exercised within a reasonable time? Had they not the right to waive this condition? If so, did they waive it? Did this provision mean that the whole sum borrowed should be returned without giving credit for the payments already made? Suppose the plaintiffs had made all the payments required except the last, could it be contended that the whole amount borrowed would become due without giving credit for the payment made? Would any court enforce so unconscionable a contract? The court of North Carolina (*Rowland v. Old Dominion etc. Assn.*, 116 N. C.

877; 115 N. C. 825) and of South Carolina (Buist v. Bryan, 44 S. C. 121; 51 Am. St. Rep. 787) have spoken in no uncertain terms, and have denied that upon such default the association may consider the whole amount forfeited in face of the fact that payments have been made. Now, with this in view, is it not possible, is it not probable, that plaintiffs may have paid \$2,300 for the \$1,500 borrowed, which is probably about the amount that would be due, at seven per cent interest, ninety days before the time the association estimated that the bond would be paid, when defaulted, and the whole amount of \$1,500, with interest, would become due. The prayer of the complaint is no part of the cause of action, nor, indeed, is it considered a part of the complaint in setting out the supposed relief to which the plaintiff deems himself entitled. The bank undertook the confidence or trust ⁷⁹ of holding the money as specially agreed. Now, in plain violation of the assured trust, and to the alleged damage of the plaintiffs, the money was paid over. Can it be successfully contended (if these facts be true) that a cause of action is not made out? We are not prepared to say the circuit judge was in error in holding that the allegations of the complaint were sufficient to set up a cause of action against the association for excessive collections, and against the bank for being an active aider, and in violation of the trust it assumed.

2. Was there a misjoinder of two separate and distinct causes of action? Section 188 of the code declares that: "The plaintiffs may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: 1. The same transaction or transactions in connection with the same subject of action, etc. . . . But these causes of action must all belong to one of these classes, and . . . must affect all the parties to the action, and not require different places of trial, and must be separately stated." Now, did the cause of action against the defendant association and the cause of action against the Bank of Cheraw arise out of "the same transaction" or "transactions connected with the same subject of action"? We find that the text-writers, upon the construction of this seemingly simple provision, have not laid down any inflexible rule to determine its meaning and application. There is no comprehensive rule, it would seem, by which cases that may arise under this section may be decided. Mr. Pomeroy, in his work on Remedies and Remedial Rights, page 479, says: "The most incongruous and dissimilar causes of action may be joined if they arise out of the same transaction or transactions connected with the same subject of action." Ac-

tions arising on contract may be joined with actions arising out of tort: Pomeroy's Rights, Remedies, and Practice, sec. 463. It would seem that while the causes of action must affect all the parties to a suit, it is not necessary that they should affect all of them equally or in the same manner. It seems to us that the "transaction" out of which both causes of action arose in this case was the alleged wrongful payment by the bank to the association of the funds (or part of them) left there on deposit. The association wrongfully collected from the plaintiffs more than was due on the bond, and the bank participated in and aided such collection by paying to the association the money of the plaintiffs so deposited. The first cause of action is the wrongful collection of the money by the association from the bank; the second cause of action is the wrongful paying of the money by the bank to the association, both arising out of the same transaction, i. e., the payment and receipt of the \$1,293.43. We think there was no error in the order appealed from on this ground.

3. It is claimed that there could be no cause of action against the Bank of Cheraw until the accounts between the plaintiffs and the defendant association are adjusted. Without again repeating the facts out of which this case arose, it is sufficient to say that such contention would probably be true, if the Bank of Cheraw had not adjusted and determined for itself the amount due, and in violation of the agreement paid the money over to the association.

The judgment of the circuit court is affirmed.

CORPORATIONS—FOREIGN—SERVICE OF PROCESS UPON. When a corporation organized and doing business under the law of one state contracts a debt through its authorized agent in another state, he is so far its managing agent there that service of summons upon him for the debt while he is temporarily within the state will bind the corporation: *Klopp v. Crescent City etc. Waterworks Co.* 84 Neb. 808; 33 Am. St. Rep. 606. See *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32; 41 Am. St. Rep. 831, and note; extended note to *Hampson v. Weare*, 66 Am. Dec. 121.

CORPORATIONS—FOREIGN—SERVICE OF PROCESS—WHEN AGENCY TO RECEIVE TERMINATES.—A corporation that transacts business in another state, and appoints an agent to receive service of process there, pursuant to a statute of that state requiring this, is bound by service of process on that agent at any time before the party causing the service has notice of the termination of the agency: *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. L. 67; 64 Am. Dec. 412, and note.

PLEADING—DEMURRER—JURISDICTION.—A demurrer to a complaint can be interposed only for objections appearing on its face: *Mitchell v. Thorne*, 134 N. Y. 536; 30 Am. St. Rep. 699. See *Iron Age etc. Co. v. Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; *Winston v. Taylor*, 28 Mo. 82; 75 Am. Dec. 112.

PLEADING—JOINDER OF CAUSES OF ACTION.—Many causes of action under the code practice may be joined in one petition: *Mooney v. Kennett*, 19 Mo. 551; 61 Am. Dec. 576. In California, a cause of action in tort may be united with a cause of action on contract, if both arise out of the same transaction: *Jones v. Steamship Cortes*, 17 Cal. 487; 79 Am. Dec. 142. See *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142.

GRAHAM v. FIRE INSURANCE COMPANY.

[48 SOUTH CAROLINA, 195.]

INSURANCE—EXTRINSIC EVIDENCE OF OWNERSHIP OF INSURED PROPERTY.—When a policy of insurance on personal property has been issued to A B, providing that the loss should be payable to C D as his interest may appear, extrinsic evidence is admissible to prove that C D was the owner of the property, but that it was in possession of A B at the time he effected the insurance thereon, who was interested in the preservation of the property, for the reason that he was in possession as superintendent of C D, and entitled to profits resulting from the use of the property in the business in which he was employed.

INSURANCE—OWNERSHIP OF PROPERTY, FAILURE TO CORRECTLY DISCLOSE.—Where a policy of insurance purports to be in favor of A B, loss payable to C D as his interest may appear, parol evidence is admissible to prove what were the respective interests of A B and C D, and that the latter was the owner of the property, but the former was in possession as superintendent or agent, and as such had some insurable interest therein.

INSURANCE—ESTOPPEL TO DENY LIABILITY—EVIDENCE.—Where a policy of insurance issues to A B, loss, if any, payable to C D as his interest may appear, evidence is properly received for the purpose of showing that the insurer is estopped from defending on the ground that C D's ownership was not disclosed in the policy, to prove that the agents of the insurer, after the loss occurred and they were notified of C D's ownership, required him to repair to his home in another state in order that he might furnish proofs of loss from his own books, and that, after inspecting proofs made from such books, they directed further proofs of loss to be made by the insured.

INSURANCE—NOTICE GIVEN TO AGENT.—Evidence is properly received of directions given by the insured to his agent to procure a policy for him, if it further appears that such directions were communicated to an agent of the insured.

INSURANCE—EVIDENCE OF NOTICE TO AGENT OR AGENT'S CLERK.—If an agent issuing a policy of insurance has notice of facts which by conditions therein specified make it void when issued, the insurer must be deemed to have waived those conditions. As tending to prove such notice, evidence may be received that it was given to a clerk of the agent, and that the agent soon afterward issued a policy, and of the subsequent canceling of the policy, after which he as agent of another insurance corporation, issued another policy on terms which tended to prove that in issuing it he had in his mind the information received as agent before issuing the prior policy as the agent of another insurer.

EVIDENCE—ADMISSIONS OF AGENTS.—For the purpose of proving that an insurance corporation had notice of the ownership of property insured at the time of issuing a policy thereon, evi-

dence is admissible that the agent who issued such policy admitted that he had such notice.

INSURANCE — ESTOPPEL — WAIVER.—THE DEFENSE that the insured was not the sole and unconditional owner of the property cannot be made where it appears that the agent of the insurer was informed that the true ownership of the property was in one C D at the time the insurance was effected, and thereupon issued the policy payable to the insured instead of to C D, but making the loss payable to C D as his interest may appear.

INSURANCE—ESTOPPEL AGAINST INSURED.—One receiving and retaining a policy of insurance is not estopped thereby from proving that his interest or ownership is different from that therein disclosed, if, before receiving the policy, he truly stated such interest and ownership to an agent of the insurer.

INSURABLE INTEREST.—One in whose possession property is as superintendent for its owner, and who has agreed to have it insured, and who has a contract to be employed as such superintendent for a term of years, and whose family, in the event of his death before the expiration of that term, may be entitled to an annual salary from such owner, has an insurable interest in the property.

Action by John M. Graham and G. H. Tilton against the American Fire Insurance Company of Philadelphia. The judge presiding at the trial instructed the jury that anyone having an interest against the loss of property by fire might insure such interest that an insurable interest existed in favor of every person who might fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject matter of the insurance, whether such advantage inured to him personally or as representing the rights or interests of another, and that persons chargeable, either by law, custom, or contract, with the duty of caring for and protecting property in behalf of others, or having a right to so protect such property, though not bound thereto by law, or who would receive a benefit from the continued existence of the property, whether they had any title or lien upon, or possession of it, or not, had an insurable interest therein. The court refused the request of defendant's counsel to instruct the jury that Graham did not have an insurable interest in the property, and stated that it so refused because it appeared from the contract received in evidence that Graham had been appointed by Tilton as superintendent to take charge of and to protect and preserve the property; and the court granted the request of the plaintiffs that the jury be charged that if they believed from the evidence that Tilton put Graham in possession of the property as his agent or superintendent for the purpose of dealing with it in the ordinary course of business, and if Graham was under contract with Tilton to insure the property, then that Graham had an insurable interest therein; and the court further charged that if Graham had possession of the property and sus-

tained such relation to it that he might suffer pecuniary loss from its destruction by fire, that he had an insurable interest therein. The court further instructed the jury that the burden was upon plaintiffs to prove that the insurance company had notice of the relations existing with reference to the property between Tilton and Graham, but that if the jury had concluded from the evidence that Mr. Jones had knowledge as an agent of the defendant of such relation, and the company, knowing these facts, accepted the premium upon the policy and issued it in the form in which it was issued, then that the insurer could not successfully defend on the ground that the true ownership of the property was not disclosed in the policy. The court also instructed the jury that notice to an agent was notice to his principal, and, if they believed from the evidence that Allen Jones was the agent of the defendant in issuing and delivering the policy sued upon, then that the defendant was chargeable with notice of such facts as were then known to said Jones. With respect to the claim made by the plaintiffs that the insurer, after learning through its adjuster of the facts upon which it now sought to defend, led the insured to believe that it still recognized the validity of the policy by inducing and encouraging them to incur expense and trouble in preparing and furnishing proofs of loss, the jury was instructed that then the insurer is estopped from insisting upon any ground of objection then known to it as a defense to the action. Verdict and judgment for the plaintiffs; the defendant appealed.

Trenholm, Rhett and Miller and John T. Sloan, for the appellants.

J. S. Muller and John T. Seibels, contra.

²¹⁴ POPE, J. The defendant, on the fifth day of April, 1894, issued to the plaintiff, John M. Graham, its policy of insurance, wherein, for a premium of fifteen dollars, it agreed to indemnify against loss by fire "his stock of material for ²¹⁵ the manufacture of cotton and woolen hosiery, raw, wrought, and in process thereof, while contained in the two-story brick and shingle roof building situated within the walls of the South Carolina Penitentiary, at Columbia, South Carolina. Any loss that may be ascertained and proved due the assured shall be payable to G. H. Tilton, as his interest may appear." The policy contained the usual printed stipulations of those issued on personal property. Two of these, however, were in these words: "This policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance

concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership." On the twenty-fifth day of April, 1894, the stock of material, valued at more than five thousand dollars, was destroyed by fire, except about six hundred dollars' worth; thus the loss was about four thousand four hundred dollars. There was concurrent insurance—three policies—each for one thousand dollars, which latter was the amount named in the policy issued by defendant. Soon after the fire an agent of the defendant, with agents of the companies which had issued concurrent insurance, were on hand to adjust the loss, or rather losses. G. H. Tilton also appeared on the scene; his home was in the state of New Hampshire. John M. Graham informed the insurance companies at once that G. H. Tilton was the sole owner of the material insured, and that his (Graham's) connection with the hosiery manufactory was superintendent. After some time proofs of loss were submitted. Three of the companies paid up in full, but the defendant company declined to do so. Hence this suit. The complaint alleges the ownership of the property destroyed by fire to be in G. H. Tilton, but that the ²¹⁶ same was in the sole custody and control of John M. Graham, under a contract therefor between Graham and Tilton, which included the insurance of the property against loss and damage by fire; that under said contract the said Graham was to receive from said Tilton an annual compensation for his services so long as said contract was of force, and that the said Graham was pecuniarily interested in the preservation and continued existence of said property. The contract for insurance was set out, inclusive of the policy itself, as part of the complaint. In the fourth clause of the complaint was set out the allegation that the insurance company was aware that Tilton owned the property, but that the same was in the exclusive possession of said Graham, and that he had a pecuniary interest in the preservation of said property, and that the policy of insurance was issued by the defendant in the name of the plaintiff, J. M. Graham, with the indorsement in favor of said G. H. Tilton, as his interest might appear, primarily for the benefit of Tilton, but also for the benefit of said Graham as aforesaid, and that the

said policy was received by the said plaintiffs in good faith as insuring their interests as aforesaid. In the fifth clause is set out the loss of property by fire on the 25th of April, 1894, and plaintiffs' loss thereby. In the sixth clause it is alleged that proofs of loss and interest have been furnished the defendant, and also that all conditions have been truly observed by the plaintiffs. In the seventh clause demand of payment and its refusal are set forth.

The answer admits that the property destroyed by fire was covered by the policy issued by it; that Tilton was the owner thereof; that said property was in the exclusive possession of Graham; that there were three other policies of concurrent insurance, each for one thousand dollars, on said property; that proofs of loss have been furnished to it, and demand made for payment of policy. And, affirmatively answering, the defendant alleges that the plaintiff, John M. Graham, in whose name the policy was issued, was bound by the express ²¹⁷ conditions, covenants, and promissory warranties in the policy named—two of which were: 1. That the entire policy should be void if the insured has concealed or misrepresented any material facts and circumstances connected with the insurance; and 2. That the entire policy should be void if the interest of the insured be other than unconditional and sole owner; and that John M. Graham neither fully disclosed the material facts and circumstances connected with the insurance, nor was he the unconditional and sole owner of said property.

The action came on for trial before the Honorable I. D. Witherspoon and a jury at the fall term, 1895, of the court of common pleas for Richland county. After plaintiffs had closed their testimony, a motion for nonsuit was made and refused. The verdict was in favor of plaintiffs for full sum complained for, including interest. Therefrom the defendant appealed to this court on many grounds and subdivisions thereof, which will now be disposed of by us. The report of the case will include the exceptions, and also the charge of the presiding judge. We will consider them as embraced in these divisions: 1. Did the circuit judge err in admitting the testimony objected to by the defendant? 2. Was the circuit judge in error in refusing the defendant's motion for a nonsuit? 3. Were the refusals to charge and the charge itself erroneous in the particulars complained of?

I. As to the first ground of appeal. While the plaintiff, J. M. Graham, was being examined on his own behalf and that of his coplaintiff, Tilton, his counsel asked him if the paper, contain-

ing the agreement between himself and G. H. Tilton, touching the control and management of the hosiery mill by Graham as its superintendent, was the contract between them as to these matters. To this question the defendant promptly objected, because it was not in response to any of the issues raised by the pleadings, inasmuch as the only reference to such contract in the complaint was a conclusion of law; that the defense was surprised at the contents of the paper, and second, that ²¹⁸ the contract of insurance sued upon is in writing, and is clear and explicit in its terms. The defendant objects to any parol evidence being introduced to vary or contradict the clear and explicit terms of the contract, or any evidence to do so. To understand the ruling of his honor, the circuit judge, whereby he admitted this testimony, it is important that we should understand his environments. In the first place, the circuit judge was bound to keep in his mind that, this being an action to recover upon a policy of insurance of personal property destroyed by fire, while such policy was of full force, the laws of this state, as fixed by the decisions of our court of last resort, hold: "Insurance is not an incident to the thing insured, but indemnity or compensation to the person insuring for the loss which he sustained" (italics our): *Annelly v. De Saussure*, 26 S. C. 505; 4 Am. St. Rep. 725; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 266, 267; *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. 496; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452. The contract of insurance sued upon, by its express terms, provided that any loss to be recovered by the assured should be payable to G. H. Tilton, "as his interest may appear," and this is the only reference to G. H. Tilton in the entire policy of insurance. Inasmuch as the policy of insurance failed to indicate what was the interest of G. H. Tilton in the personal property insured against loss by fire, it is very manifest that if such interest of G. H. Tilton is to be made to appear, it must be done by evidence outside of the terms of the policy itself. Then, again, the policy itself fails to indicate what meaning the parties to it intended should attach to the word "interest." In policies of insurance of personal property, the word "interest" is sometimes held to mean "insurable interest": 1 *Bouvier's Law Dictionary*. But it may be that another meaning or other meanings may be ascribed to it. By the pleadings in the case at bar it was distinctly announced that G. H. Tilton was the actual owner of the personal property which was insured, but that the same personal property was in custody and control of the ²¹⁹ plaintiff, J. M. Graham, under a contract with the said Tilton. Hence it seems to us that it was a pertinent inquiry as to what

were the terms of that contract. We are at a loss to see any controlling influence in the objections of the defendant to the introduction in evidence of such a contract, for it would in no wise infringe upon the rights of the defendant that Tilton and Graham had made a contract between themselves as to this property, which was to last from the year 1891 until twenty years thereafter, in the light of the contract for the insurance of this personal property, wherein it was alleged that it was the property of J. M. Graham, but coupled with the distinct provision that any loss under the policy to be recovered by J. M. Graham "should be payable to G. H. Tilton as his interest may appear." To say that the introduction of such testimony would serve to vary or contradict the written terms of the policy of insurance itself will not do, for the parties to the contract of insurance had it in their power, when such contract was entered into, to make clear what they meant by the use of the words just quoted, and they did not do so. The circuit judge, in construing this policy of insurance, could not tell what the parties to it intended; hence the necessity of testimony to show what Tilton's interest in such insured property was. This exception is overruled.

(b) The second ground of appeal. When the witness for plaintiffs, J. M. Graham, was asked to state how he came to insure the property after the year 1891—the date of his contract with G. H. Tilton—the defendant objected, upon these grounds: 1. That the defendant had no notice of such verbal agreement or of any relation subsisting between Tilton and Graham in reference to the property mentioned in the policy; 2. Because there was no ambiguity or uncertainty in the contract, and it should have been conclusively presumed to be the whole engagement of the parties thereto, and it was error to admit evidence seeking to include under said policy an insurable interest not mentioned in the policy, and negatived by ²²⁰ its very terms, and of which there was no proof that the defendant had any notice; and 3. On the ground that defendant was surprised thereby, and misled to its prejudice. Again, it is our duty to remember that the circuit judge had the policy before him, and that such policy contained the fatal words, "any loss, etc., to be paid to G. H. Tilton as his interest may appear." What G. H. Tilton was referred to? The policy failed to show who he was. What was the interest of G. H. Tilton that might be made to appear? The policy is silent. What business corporation guided by intelligence could afford to remain ignorant of who G. H. Tilton was, and of what interest he might be possessed? This policy by its very terms necessitated a recourse to proofs, dehors the policy itself, to show these facts.

The plaintiffs accompanied their complaint in this action with a copy of this policy of insurance. The defendant had notice of these terms by the complaint itself, and it is too late to talk of a surprise by which they were misled to their prejudice by allowing this testimony to be introduced. This exception is overruled.

(c) To make plain the question raised by this the third ground of appeal, it may be well to state the facts upon which it is based. The policy of insurance sued upon, as we have before stated, stipulated that the defendant did insure against loss by fire the personal property as the property of J. M. Graham, but with the provision that "any loss that may be ascertained and proved due the assured shall be payable to G. H. Tilton as his interest may appear." That said Graham, when the adjusters of the different insurance companies which had policies outstanding on said property when destroyed by fire, appeared in the city of Columbia, South Carolina, immediately after the fire, told them that the property was owned by G. H. Tilton, and that thereupon the said adjusters required G. H. Tilton to repair to his home in the state of New Hampshire in order that he might furnish proofs of loss from his own books, and that some weeks afterward said ²²¹ adjusters were notified that Tilton had the proofs of loss, as ascertained from his own books, ready in Columbia for their inspection, and that thereafter the said adjusters returned to the said city of Columbia, South Carolina, and upon said proofs from the books of Tilton being inspected by them, they, the adjusters, directed the said J. M. Graham to make up proofs of loss, which he did; and that while three companies paid up their losses, the defendant refused so to do. Upon these facts, the plaintiffs desired to predicate the proposition that the defendant was thereby estopped by its conduct to deny the validity of plaintiffs' claim for the insurance money under the policy sued upon. The witness, J. M. Graham, was asked to state these facts, but the defendant objected on the grounds: 1. That at the time of the occurrence of which he was about to testify, the said Graham was fully apprised of the purpose of the defendant to contest any liability under this policy of insurance by reason of the fact that he was not the unconditional owner of the property insured, and that the defendant, in making its requirement of proofs of loss, was but in the exercise of its rights under its contract, with no evidence of the abandonment of such defense; and 2. Because the evidence offered did not show any intentional abandonment of his right to hold to the contract of insurance, and in no way caused the plaintiffs to abandon their position or suffer any injury, loss, etc. We cannot see why the plaintiffs should not be allowed to show

by their proofs that the defendant by its conduct was estopped from contesting the plaintiff's right to recover under the policy. We venture no opinion, for under the law we are allowed to express no opinion as to the sufficiency of this testimony to establish this estoppel. The circuit judge was only concerned as to its admissibility, and he held it was competent. We see no error here. Besides all this, the very grounds of objection only go to the sufficiency of the testimony, and of this the circuit judge could express no opinion.

(d) The fourth ground of appeal relates to the objection ²²² of the defendant to the witness, Graham, stating what conversations he had with, or what directions he, Graham, gave to, Mr. W. C. Swaffield, who procured for him the policy sued on, on the sole ground that the defendant was not present when such conversation or direction occurred. The defendant is a corporation, but we suppose the appellant means to say the corporation was not present by any of its agents. His honor only admitted this testimony upon the assumption, no doubt, that while no such agent might have been present to hear the conversation or direction in question, yet it was afterward communicated to the agent of the defendant. Mr. Graham did not effect this insurance in person, but through Mr. Swaffield, as his agent. Under the explanation just made, we see no objection to the testimony.

(e) The next, the fifth ground of appeal, relates to the competency of the testimony of Mr. Swaffield, as the agent of the plaintiffs, in detailing his declarations to one Mr. Fripp, who was connected with the fire insurance agency of Mr. Allen Jones, from which agency the policy now sued on was obtained. We will state the circumstances so that we may more correctly pass upon the ruling of the circuit judge on this point. Allen Jones operated an insurance agency in the city of Columbia, South Carolina. He had in his employment a young man, Mr. Fripp, to whom was assigned many duties incident to the issue of policies of fire insurance, but not to the extent of countersigning the same—that part of the work was always performed by Mr. Jones himself. While Mr. Fripp was employed during the month of March, 1894, Mr. Jones represented the defendant company, and also another company, the Fire Assurance Company of Philadelphia. Upon the application of Mr. Swaffield, as the agent of J. M. Graham, to Mr. Fripp for one thousand dollars insurance on the property now under discussion, Mr. Fripp was told by Mr. Swaffield exactly how Mr. Tilton stood to this property, viz., that he was the owner, and that J. M. Graham was his superintendent ²²³ in charge of the property. The policy applied for was issued

by the said Fire Assurance Company of Philadelphia; but within a short time, say a week or ten days, this company, from its home office in Philadelphia, ordered the policy canceled, which was done; and early in the month of April a policy was issued by Mr. Jones, as agent in the defendant company. Mr. Fripp left Mr. Jones' employment on March 31, 1894. Mr. Swaffield could not state whether he had told Mr. Jones the facts he had communicated to Mr. Fripp; he was impressed that he had. But it was desired to have Mr. Swaffield testify as to the communication he had made to Mr. Fripp in regard to Tilton's ownership of the property, and that this was the cause of the insertion of the clause in the policy that all losses should be paid to Tilton, as his interest might appear. Judge Witherspoon, on this point, ruled as follows: "Under the allegations of the complaint, and the terms of the policy issued to J. M. Graham, I hold, under the authority of *Pelzer etc. Co. v. Sun Fire Office*, 36 S. C. 213, that it is competent for the plaintiff to offer evidence to show that, at the time of the issuing of the policy and the receipt of the premium by the company, the agent of the company issuing the policy knew the relation then existing with reference to the property in dispute between Graham and Tilton. I further hold that the admission of such testimony does not violate the general principle, or rule, that a written instrument cannot be altered or the terms thereof varied by parol testimony." Mr. Chief Justice McIver, in his elaborate opinion in the case of *Pelzer etc. Co. v. Sun Fire Office*, 36 S. C. 213, quotes with approval this language used in *Menk v. Home Ins. Co.*, 76 Cal. 51, 9 Am. St. Rep. 160: "The tendency of the decisions is plainly to hold all these conditions waived, which to the knowledge of the agent would make the policy void as soon as delivered. Otherwise, the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." Hence, if this defendant company knew as a fact that Tilton was the actual owner of this property, and that J. M. Graham held it as his superintendent only, although it was recited in the policy that it was the property of Graham, coupled with the stipulation that all damages thereunder should be payable to Tilton, as his interest might appear, then the defendant company was bound to make good any loss under such contract; for, otherwise, such "company would knowingly receive the money" of the applicant, without value returned, and the whole transaction would be a palpable fraud. And at page 269 of the same case, the chief justice of this court observes: "Insurance companies or their agents are, of course, presumed to know what facts

and circumstances are material to the risk offered much better than the persons who are applying for the insurance; and if they choose to accept the insurance without inquiry, and when a loss occurs it appears that some fact which the insurance companies may regard as material to the risk was not communicated by the insured, common honesty and fair dealing forbid that this shall operate as a forfeiture of the policy, unless it also appears that the insured either knew at the time, or ought to have known, that such fact was material. Inasmuch as insurance companies, when applied to for insurance, have the right to make, and, as a matter of fact, do make, the fullest and most minute inquiries, when the application is in writing, the insured has a right to assume, when no such inquiries are made, either that the insurance companies or their agents are fully acquainted with all the facts material to the risk or that they do not regard the facts as are not stated as material." The agent, Mr. Allen Jones, had just issued a similar policy to the same party, on the same property, in another company, which had just been canceled, acting in the issuing of such policy through his clerk, Mr. Fripp, to whom Mr. Swaffield, as the agent of the plaintiffs, had made full disclosure as to Tilton's ownership and as to Graham's connection therewith, and on the fifth day of April, 1894, not a ²²⁵ month after the issuing of the first policy, the same agent, Mr. Jones (who was a fully commissioned local agent of the defendant company), was about to issue a new but similar policy to the same parties, on the same property, in another company, it became important to the plaintiffs to show what notice such agent had given him touching this property, so far as its ownership was concerned. The testimony was relevant and admissible. It cannot be said that Mr. Jones, as agent, was not bound by the information his own clerk had received in the due course of his employment by him. All this taken in connection with the charge of the presiding judge, "In order for notice to Fripp to be binding on this company, it must appear that Fripp was Jones' agent at the time, and that he had authority to bind the company in the way indicated." This ground of appeal is dismissed.

(f) The sixth ground of appeal cannot be sustained. It was perfectly competent for the plaintiffs to show, if they could, that the defendant company admitted notice of Tilton's ownership of the property at the time the policy was issued, as it was before stated, and, to do this, no more efficacious mode existed than of showing that the agent, Mr. Allen Jones, who issued the policy, admitted that fact. This was the tendency of the testimony of Colonel Marshall and Mr. Seibels, the two witnesses who were in-

troduced for this purpose by the plaintiffs, and whose testimony was objected to. As to the sufficiency of this testimony, that was quite another matter, and is not, and cannot be, before us.

II. The seventh ground of appeal questions the correctness of the refusal of the circuit judge to grant a nonsuit. 1. "Because it appeared from the evidence beyond dispute that Graham was not the sole and unconditional owner of the property mentioned in the policy." Granted that the evidence and admissions established the fact that Graham was not the sole and unconditional owner of the property insured, this would not necessarily defeat the plaintiffs, for there was testimony before the ²²⁶ court going to show that the defendant well knew, or was bound at its peril to know, that Tilton was the unconditional owner of that property, at the very moment it issued its policy with a contrary recital therein, and yet, after that knowledge, received the premium for this insurance. There was evidence before the court going to show that Graham had an insurable interest in this property.

2. "Because there was no evidence upon which to base an estoppel against the defendant, preventing its claim that the policy was void from its inception." The estoppel here involved is an estoppel by conduct. This court, in *Bull v. Rowe*, 13 S. C. 370, thus defined it: "As we understand it, estoppel by conduct is when one party has been induced by the conduct of the other to do or forbear doing something which he would not or would have done but for such conduct of the other party": *Bigelow on Estoppel*, 480. The conduct which is claimed to operate as an estoppel must have induced action, the disavowal of which would be inequitable, and which, therefore, the party who holds out the inducement is estopped from disavowing. There is no estoppel without fault to the injury of another." Now, in the case at bar, there was strong testimony going to show that the defendant knew, when it issued this policy of insurance, all the facts relating to the ownership of the property by Tilton, and not by Graham, which latter was set out in its policy; and that after this knowledge, that full value was paid for this insurance; that the plaintiffs intended this property to be insured against loss by fire; that the property had been destroyed by fire, and, therefore, could not now be insured. It occurs to us that there was some testimony, to state it most mildly, which it was proper for the jury to pass upon, and which, if true, would estop the defendant from claiming its policy void.

3. "Because the doctrine of estoppel and waiver is not applicable when the point in issue is as to the subject of insurance,

and the contract is explicit on that point." We might be content to quote the words of defendant's attorneys ²²⁷ in this appeal: "There is no magic in a contract of insurance; it must be judged of and construed like all other contracts between man and man." Although we here state that this language is quoted from appellant's argument, yet it is but just to say it is there recognized and reproduced from the opinion of Chief Justice McIver, in *Pelzer etc. Ins. Co. v. Sun Fire Office*, 36 S. C. 213. This ground of appeal is dismissed.

4. "Because the plaintiff, John M. Graham, was, by the retention of the policy without objection, himself estopped from claiming that it did not contain the contract of insurance as agreed, or that he was not bound by its explicit terms." We cannot regard this proposition as good ground for a nonsuit. Graham retained the policy of insurance, as issued by the defendant, with full faith that he had carried out the directions of his employer, Tilton, because he saw from the policy that the property was accurately described, and an indemnity promised, in case of its destruction by fire, to be paid to the true owner, Tilton, thereby protecting to him the property he was, by his contract with Tilton, to manage for twenty years at a remuneration liberal in its terms (for it was to last during his life, and, if he should die, survive to his wife during the twenty years provided for). Graham is to-day satisfied with the contract of insurance, and in this action seeks its enforcement. We cannot see how the application of the doctrine of estoppel can be made to apply to him.

5. "Because, if the doctrine of estoppel was applicable against defendant, it extended no further than to cover whatever individual insurable interest the said Graham may have had in the property, and for this insurable interest no recovery could be had, for the testimony conclusively showed that the said Graham had suffered no injury to that individual insurable interest." We have heretofore held that there being testimony before the court upon which, if true and sufficient, the doctrine of estoppel might be successfully applied as against the contention of the defendant, that its policy of insurance was void, no more need now be said on ²²⁸ that part of this ground of appeal. So far, however, as the insurable interest of Graham is affected by this ground of appeal, we cannot agree with the appellant, for the reasons we shall now set forth in our treatment of the next ground of appeal. We find no fault with the refusal of the circuit judge to grant a nonsuit.

III. We will next consider the alleged errors of the circuit

judge in his charge to the jury. 1. The circuit judge erred in his refusal to charge that Graham had no insurable interest in the property insured under his written and verbal contract with Tilton. If we were to take this proposition literally, it might well be said that the appellant had sought a charge from the presiding judge upon the facts, which, of course, the judge could not do. But we will assume that the appellant meant to say that if the facts are established as set out in the contract in writing between Tilton and Graham, and also as embraced in the oral agreement between the same parties, then the question is raised, that, under such facts, Graham had no insurable interest. The circuit judge, in his charge to the jury, made these quotations from 1 May on Insurance, section 80, page 144: "Whoever may be fairly said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest." And from the conclusion of the same section, the circuit judge quoted these words: "Persons charged either specifically by law, custom, or contract with the duty of caring for and protecting property in behalf of others, or having the right to so protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have or have not any title or estate, or any lien upon or possession of it, have an insurable interest." In Rapalje and Lawrence's Law Dictionary, it is said: "In the law of insurance, a person is considered to be interested in property when the ²²⁹ destruction or injury of the property would expose him to pecuniary loss"; and quite an array of authorities is cited in support of this enunciation of the law. By reference to the contract made between Tilton and Graham in February, 1891, it will be seen that twenty years' term of service as superintendent is provided for Graham at an annual salary, after the year 1891, of two thousand five hundred dollars, and that in case he dies before the period of twenty years, his wife is to be paid twelve hundred dollars per year; and in case of his or her death during that period, his children shall be paid twelve hundred dollars per annum. Also, that if Tilton wishes to discontinue business during that period, important privileges as a purchaser are secured to Graham. By parol, it was agreed between Tilton and Graham that the latter should insure the property. It seems very clear to us that there was an insurable interest in Graham as well as Tilton in this property. It can make no difference that, after the property was destroyed by fire, Tilton re-estab-

lished the hosiery business and continued Graham's salary. It must be remembered that he has secured three thousand dollars of the concurrent insurance on this property, and it is not at all unlikely that he acted as if this policy was cash in hand, by anticipating its payment. But be these last matters as they may, Graham had an insurable interest. Suppose, for instance, that by the destruction of insured property, the mill, too, had been destroyed without any insurance, and that it had been owned by Tilton, and the loss had been so great that Tilton was unable, from the lack of means, to rebuild and re-equip his mill, although the insurance money recovered on the personal property was sufficient to re-establish a hosiery mill in leased quarters, would not Graham have some rights, under his contract with Tilton, he could enforce in equity? The presiding judge was not in error here.

2. So far as the ninth ground of appeal is concerned, it seems to us to present an abstract question of law. If Graham had no insurable interest, and the defendant, when it issued its policy in Graham's name, as ²³⁰ owner, with the loss payable to Tilton, as his interest may appear, and it did appear that the company knew he, Tilton, was the owner of the property, though it was in the name of Graham, as owner, how did the judge commit any error in the charge? We cannot see. The contract itself provided for Tilton being paid the whole insurance money; it is not a case of a policy being taken out by a person not the owner, with no reference to the interests of the owner, but quite the contrary. "Let our just censure attend the true event." This ground of appeal is dismissed.

3. The tenth ground of appeal will not be considered by us, because it is certainly an abstract proposition of law. The verdict rendered by the jury shows conclusively that they were not influenced by it in any manner whatsoever, for they, the jury, found the exact amount due under the policy, viz., the sum of one thousand dollars, and interest thereon after sixty days from the notice of proofs of loss, thus showing conclusively that they paid no attention to any insurable interest of Graham to be paid to Tilton, so far as the value of that insurable interest of Graham was concerned.

4. The eleventh ground of appeal is next in order. A comparison of the terms of the request to charge with the actual charge of the judge will show that he protected the defendant in these matters here embraced fully and effectually. We overrule this ground of appeal.

5. The twelfth ground of appeal is fully covered by the judge's charge, and is, therefore, dismissed.

6. The thirteenth ground of appeal seeks to impute error to the circuit judge by his refusal to make the charge as requested. In effect, it states that if the jury conclude that John M. Graham did have an insurable interest in the property covered by the policy, and that the defendant wrote its policy notwithstanding its knowledge of this fact, that neither Graham nor Tilton can recover unless the jury believes that the destruction of such property caused John M. Graham pecuniary loss; and if the jury believe that John M. Graham lost no salary by reason ²³¹ of the destruction of the business by fire, and that said mill is still operated by Graham under his contract with Tilton, neither Tilton nor Graham can recover under the policy. The judge acted very wisely in refusing to make this charge, for it did not cover the issues raised in this action. If Graham had insurable interest in this property, and he obtained a policy of insurance thereon by which all loss was to be paid to Tilton, its owner, what difference did it make to this company that Tilton provided a new stock for the hosiery mill, whereby Graham was enabled to still earn his salary? Besides, as we remarked before, a judge can only fairly and justly be expected to make his responses to requests to charge where the same practically affect the issues which are on trial in the action. This ground of appeal is dismissed.

7. The fourteenth ground of appeal complained of the refusal of the circuit judge to charge as requested by the defendant as set out in this ground of appeal: "If the jury believe from the evidence that the defendant or its agents had knowledge, previous to the delivery of the policy, to the effect that there was no mortgage on the property, and that the loss payable clause was inserted for the purpose of permitting Tilton to control the insurance money, that such information was not knowledge of the ownership of Tilton, and the defendant would not be estopped from setting up the defense that plaintiff, Graham, had not truly stated his interest in the policy, or was not the sole and unconditional owner thereof." We think the circuit judge in his general charge covered this point. He explained what was actual notice and what was constructive notice, and he was careful to explain to the jury the issues as raised by the pleadings, but was equally as careful to refrain from weighing testimony for them. A circuit judge must necessarily observe great care that in his charge, whether on requests or not, he does not nar-

row the inquiry into the facts by the jury. There was direct testimony before the jury that the agent of the defendant ²³² had both actual and constructive knowledge of the ownership of Tilton of this property. The circuit judge very wisely declined, by refusing this charge, to appear to pass upon the facts by saying what would be the effect of all the testimony upon the fact of knowledge, or of all the testimony added to a constructive notice as to this knowledge of ownership. All that litigants can demand is that the circuit judge shall faithfully expound the law of the case, and if in his general charge, which in effect covers specific requests, he can better do this than in a direct answer to a specific request, it is not error. This ground of appeal is dismissed.

8. The fifteenth ground of appeal will be considered. So far as this ground of appeal is concerned, we feel that the appellant has overlooked the restrictive words in the judge's charge touching the effect given, or to be given, Mr. Swaffield's statement to Mr. Fripp. In our notice of this matter in a previous part of this opinion, we have taken consideration of it, quoting the judge's charge on the point. We do not think in the light of that quotation from the judge's charge there is any practical question left open. This ground of appeal is dismissed.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., dissenting. I dissent; but as I am unwilling to delay the filing of this opinion by taking the time necessary to write out my views, I must content myself with simply indicating the points upon which I differ from the majority of the court, viz: 1. As to the construction and effect given to that clause in the policy providing that the same shall be void if the assured was not the sole and unconditional owner of the property insured; 2. As to the views presented as to the competency of the testimony as to what the clerk, Fripp, was told in regard to the interest of Tilton in the property insured; 3. As to the views presented in regard to the question of estoppel; ²³³ 4. As to the views presented in regard to Graham's insurable interest in the property insured.

INSURANCE—KNOWLEDGE OF AGENT—WHEN BINDS INSURER.—Notice to an agent of facts material to the risk is notice to the insurer: *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400; 57 Am. St. Rep. 140. and note. If the agent fails to properly state them in the policy, when relied upon and trusted to do so, the company is not permitted to escape liability on that ground: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note. The same is true where the notice was given to a clerk

of the general agent: *Goode v. Georgia Home Ins. Co.*, 92 Va. 392; 53 Am. St. Rep. 817, and note.

INSURANCE—INSURABLE INTEREST—WHO HAS.—If, by a loss, the holder of an interest in property is deprived of its possession, enjoyment, or profit, or a security or lien resting thereon, or certain benefits growing out of or dependent upon it, he has an insurable interest therein: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note. A tenant who has verbally agreed to keep the demised property insured has an insurable interest therein, and insurance effected in his name is valid and enforceable: *Berry v. American etc. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note.

INSURANCE—WAIVER OF CONDITION IN POLICY—FROM WHAT INFERRABLE.—A waiver of a condition in a policy of insurance may be inferred from the acts of the insurer evidencing a recognition of liability after the condition is broken, or even from a denial of obligation exclusively for other reasons: *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739, and note. See *Murray v. Home Ben. etc. Assn.*, 90 Cal. 402; 25 Am. St. Rep. 133, and note; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158; 39 Am. St. Rep. 637, and note.

DYE v. BEAVER CREEK CHURCH.

[48 SOUTH CAROLINA, 444.]

WILLS—DEVISE WHEN NOT VOID FOR UNCERTAINTY. A devise of the testator's property remaining after the payment of his debts to his wife for her to dispose of and live on during her lifetime, and, if there is anything left after her decease and burial, then to a specified church, is not void for uncertainty either in subject matter or amount.

WILLS—DEVISE FOR CHARITABLE USE, WHO MAY TAKE.—A church, though it is an unincorporated association, is capable of taking and holding land as a devise for the tuition of poor children.

WILLS.—IT IS NOT ANY OBJECTION TO A DEVISE TO A CHURCH that the devise is not germane to the purposes for which it was organized, for, if it be not germane, or for any cause the church association cannot carry out the trust, some other trustee will be appointed.

WILLS.—A DEVISE FOR A CHARITABLE USE is not so vague, indefinite, and uncertain as to the objects and beneficiaries of the use as to be void where it is to a church, for the tuition of poor children.

J. E. McDonald, for the appellant.

Ragsdale & Ragsdale, contra.

450 GARY, J. The case contains the following statement of facts: This action was commenced on the twenty-fifth day of January, 1896, by the service of a summons, together with the complaint, on the defendants. The complaint sets forth the facts that the Beaver Creek Church was an unincorporated association, of the Baptist denomination; that the other defendants

were, respectively, the deacons, and the clerk of said church or association; that one John Dye departed this life in December, 1854, leaving a last will and testament, wherein he devised a certain tract of land, situate in Fairfield county, to his wife for life, with remainder to Beaver Creek Church, for certain purposes; that the life tenant had died; that the limitations in the will, whereby the remainder was devised to Beaver Creek Church, were void for uncertainty and remoteness; that the plaintiffs are the heirs at law of the said John Dye, deceased, and that they are entitled to a partition of said tract of land, containing one hundred and twenty-seven acres; with the usual prayer for partition of the premises, or a sale of the same, if actual partition is impracticable.

The defendants, in their answers, admitted that they were ⁴⁵¹members of Beaver Creek Church, and that it was an unincorporated association, and they allege "that Beaver Creek Church is lawfully seised of the land, under the will of John Dye, deceased, and are charged with the trust therein set forth."

The cause came on for a hearing before Judge Ernest Gary, at the June, 1896, term of the court for Fairfield county, upon the pleadings and the testimony taken by the referee. As the issues arise entirely upon the construction of the will of John Dye, deceased, it is deemed unnecessary to incorporate in the "case" any of the pleadings, except the above synopsis. It is admitted by counsel that Tabitha Dye, the widow of testator, died in possession of the land mentioned in the complaint. Also, that the testator, John Dye, in his lifetime and at the time of his death, was a member of Beaver Creek Church, and that said church has now a membership of about one hundred and forty-five members; and that it is a church of the Baptist denomination, and that it is unincorporated. Also, that the defendants are in actual possession of the land in dispute, or rather that the Beaver Creek Church is in possession of the same. The following is a copy of the will of John Dye, deceased:

"In the name of God, Amen. I, John Dye, of the state and district aforesaid, being weak in body, but of perfect mind and memory, thanks be given to Almighty God, calling to mind and knowing it is once appointed for all men to die, do make and ordain this my last will and testament—that is to say: personally, and last of all, I give and recommend my soul to God, who gave it, and my body to the earth, from which it sprang, and my body to be buried decently in christian order by my executor or executrix hereinafter named. First of all, my lawful debts to be paid out of my estate, and all the balance of my per-

sonal and real estate I give and bequeath to my beloved wife, Tabitha Dye, for her to dispose and live on during her lifetime; and if there is anything at her deceast after left after her deceast and burial, I give and bequeath to the Beaver Creek Church ⁴⁵² for poor children, for their tuition. I hereby appoint my beloved wife, Tabitha Dye, and Nathaniel Davis, executors of this my last will and testament. Given under my hand and seal, the 14th day of December, Anno Domini 1854. (Signed) John Dye." (Duly witnessed.)

The plaintiffs appealed from the decree of the circuit judge on exceptions, which, together with the said decree, will be set out in the report of the case.

The appellants' attorney, in his argument, urges the following objections against the validity of the devise: 1. That the devise is void for uncertainty in the subject matter, and as to the amount. The words, "and all the balance of my personal and real estate, I give and bequeath to my beloved wife, Tabitha Dye, for her to dispose and live on during her lifetime, and if there is anything at her deceast after left after her deceast and burial, I give and bequeath to the Beaver Creek Church, for poor children, for their tuition," in effect, conferred upon Tabitha Dye a life estate, with power to dispose of said property during her lifetime (which she failed to do); but if she failed to dispose of said property during her lifetime, then it was to go to Beaver Creek Church. The case of *Sires v. Sires*, 43 S. C. 266, shows that the devise to the Beaver Creek Church would be valid, even if it had been made to an individual for his private benefit. For a stronger reason, then, the devise is valid, because it is for a charitable use, which is regarded as a benefit to the public. This objection cannot be sustained.

2. Another objection urged by appellants' attorney is: That Beaver Creek Church, being an unincorporated association, is incapable of taking and holding the land in the devise. Whatever doubts may have existed after the case of *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, as to the power of an unincorporated association to hold land for a charitable use, was dispelled by the case of *Bates v. Taylor*, 28 S. C. 476, in which this question squarely arose, and was necessarily decided. As this ⁴⁵³ is an important question, we will quote somewhat at length from that case. The facts of the case are thus stated: It appears that in September, 1847, . . . certain citizens of that part of Richland county known as "The Fork" met to devise means for the erection of an academy to educate their children, in the neighborhood of Good Hope. Subscriptions were raised to the

amount of two thousand five hundred and twenty-five dollars. Among the subscribers was John Bates, who subscribed five hundred dollars in cash, and thirty-seven acres of land. On December 2, 1847, an association or society was formed, under the name and style of the "Palmetto Society." Officers were elected, of whom John Bates was one, and the "Palmetto Academy" and "Teachers' Home" were built on said parcel of land. On July 2, 1847, at a meeting of the society, a resolution was adopted, authorizing an application for a charter, which was afterward obtained, to continue for fourteen years, under the name of the "Palmetto Society in Columbia for the dissemination of learning," and was accepted July 28, 1849. The parcel of land, known as the Palmetto Academy lot (thirty-seven acres), was marked off by a blazed line, and the buildings erected thereon have been used and held as a school ever since. It seems that, during the war, the regular meetings of the society or incorporation were not held, but a school of some character was kept there all the while. After the war, the premises were used for a time as a public school, under the general laws, and in 1883 application was made and the charter revised. John Bates, during his lifetime, never claimed the academy lot, but respected the lines. He died soon after the war (December 25, 1866), and his executors, in running his lands, left out the academy parcel, running around the old lines. His lands were sold by order of the court (1885), and purchased by the plaintiff, and she now brings this action, alleging that the title to the said lot had reverted to John Bates, in his lifetime, and passed to her under the purchase aforesaid. "The Palmetto Society," Jesse H. Taylor and C. W. Rawlinson, answered: 1. Denying each and all of the allegations of the complaint; ⁴⁵⁴ and 2. Alleging that neither the plaintiff nor her ancestor or grantor was seised of the premises in question within ten years before the commencement of the suit, but that the defendants, and those under whom they claim, have been in the adverse and exclusive possession for more than ten years, etc. The jury rendered a verdict in favor of the defendants. The plaintiff appealed to the supreme court on exceptions, the third, fifth, and sixth of which are as follows: "3. That his honor erred in his charge: 'That the defendant, 'The Palmetto Society,' could hold the land in dispute as an unincorporated association, and that said society did not hold said land as an incorporation.' 5. That his honor erred in charging: 'That when the land in dispute was given to the defendant, the Palmetto Society, no charter was in contemplation, and said society took the land not as a corporation, but as an unincorpo-

rated association.' 6. That his honor erred in charging: "That the land in dispute was given for a valuable consideration to an unincorporated association, and that association being afterward incorporated, the land was held in abeyance during the life of said corporation, and at the death of said corporation, the land herein did not revert to the grantor, John Bates, but reverted to the unincorporated association.'" In considering the exceptions, the court said: "The exceptions, in different form, complain that the judge committed error in charging that, as matter of fact, the contribution of the land was made to an unincorporated society for a public purpose, without reference to the charter which that society afterward obtained, and was allowed to expire, amidst the confusion of the war (1862), and, proceeding on this assumption, he committed further error of law in holding that the subscription was for a valuable consideration, and that the unincorporated society could accept and hold the land, either individually or as a body, without a charter, so as to divest the donor, John Bates, of the title to the same." In concluding the opinion, the court quoted with approval the following language of Chancellor Harper in *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, to wit: "But the whole subject was considered (*Vidal v. Girard*, 2 How. 127), and the opinion of the court was plainly intended to overrule the case of *Baptist Assn. v. Harts*, 4 Wheat. 1. . . . I understand these principles to be settled by the decisions referred to. If there be a bequest to a society by that name, the individuals composing it, who may be identified by evidence, take as natural persons in the same manner as if each had been particularly named, and that if it be upon a lawful trust, they will be compelled to execute it," etc. The exceptions were overruled and the judgment affirmed. The second objection cannot be sustained.

3. Another objection urged is: That the object of the devise is not germane to the purposes for which the association was organized. The case of *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, shows that when a devise is made to an unincorporated association, for a charitable use, the members thereof take as natural persons, and not as an association. That case further shows that even if a devise is incompatible with the purposes for which an association was organized, the devise would not be void, but the court would appoint another trustee. Also, that there is no objection to a corporation holding property, not strictly within the scope of the purposes of its institution, but collateral to them. There would seem to be less ground for this objection when the devise is, in effect, to members of an

unincorporated association, who hold as natural persons. There, however, is doubt whether a devise for tuition of poor children may not be regarded as germane to the purposes for which a church is organized. The syllabus of the case of *Hanson v. Little Sisters of the Poor*, 79 Md. 434, is as follows: "A trust for the maintenance of a parish school is germane to the object for which a Protestant Episcopal church is incorporated." The court sees no force, therefore, in this objection.

4. Another objection urged against the validity of the devise is: That it is so vague, indefinite, and uncertain as to ⁴⁵⁶ the objects and beneficiaries of the use, that it is void. It will be observed that the devise is for poor children, and its object is their education. The beneficiaries are a definite class, and the object of the devise is beyond question charitable in its nature. Chancellor Harper, in *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, mentions three kinds of charitable uses, the second of which is as follows: "Another instance is where trustees are appointed, but the objects are so vague and indefinite that, if the gift were to any other purpose than charity, the court must declare the trust void for uncertainty, as in the instance of *Morice v. Bishop of Durham*, 9 Ves. 399, where the trust was for such objects of benevolence and liberality as the Bishop of Durham should approve.: To a bill for setting up a charitable use of this sort, I think the attorney general ought to be made a party to aid the court *in devising the specific scheme for carrying it out*" (italics ours). In the case of *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, the devise was as follows: "I give, devise, and bequeath the whole of my estate, both real and personal, to my wife, Elizabeth Burnett, during the term of her natural life. After her death, I give, devise, and bequeath the whole of my said estate, both real and personal, to the Methodist church of which she may be a member at the time of her death, to be appropriated to the uses and purposes which the conference may deem most advantageous for said church; more especially for the support of Sunday schools, for the purchase of Bibles and religious tracts, and the distribution of the same among the destitute, and for the support of missionaries." This devise was held to be valid. In the case of *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, the court says: "In *State v. Smith*, 16 Lea, 664, where the devise was to trustees to establish 'a college of learning,' the trust was not only sustained, but the court undertook to supervise the location and plans of building and the scheme for the conduct of the college. The following

principles are settled in Tennessee: 1. That trusts for charitable uses should be favored by courts of equity; ⁴⁵⁷ 2. That where the object of the charity is definite and it is to be administered by trustees, it will be sustained; 3. That although the objects may be too indefinite for a court of chancery to undertake to administer it, yet, if a trustee capable of taking the trust be named, and clothed with the necessary powers and discretion for carrying out the charity, it will be upheld": See, also, *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 104; *Hill on Trustees*, *467; *Perry on Trusts*, secs. 710, 713, 719-722, 731; *Russell v. Allen*, 107 U. S. 163. In the last-mentioned case, the earlier decisions are reviewed, in an able opinion, by Mr. Justice Gray. We shall not attempt to review the many and conflicting authorities bearing upon the question under consideration, but state the following principles deducible from them: 1. If a trustee is appointed by the testator, and the will shows that the object of the devise, though expressed in general terms, is for a charitable use, the trust will be declared valid. In such a case, the duty devolves upon the trustee of devising a scheme for carrying the trust into effect. 2. If a trustee is not appointed by the testator, and the will does not declare the manner in which the devise is to be made effectual, equity will not administer the trust. The reason a trustee is allowed to enforce a trust, the object of which is only expressed in general terms, is that in exercising his discretion he carries out the intention of the testator. But when there is no trustee appointed to exercise this discretion in devising a scheme for the execution of the trust, the court of equity can look alone to the will, and, if it does not show the intention of the testator, parol testimony is inadmissible, and the trust must fail.

This case is different from the case of *Brennan v. Winkler*, 37 S. C. 457, in two important particulars: 1. The words which it was contended created a trust in that case were merely precatory; and 2. There was no trustee appointed by the testatrix, and as the will did not disclose the manner in which the trust was to be ⁴⁵⁸ administered by the court, it was declared a nullity. By observing this distinction is the only way in which the cases of *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, and *Brennan v. Winkler*, 37 S. C. 457, can be harmonized. The court did not intend to shake the authority of *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, in *Brennan v. Winkler*, 37 S. C. 457: otherwise it would have said so. Furthermore, the justice who delivered the opinion of the court, in *Brennan*

v. Winkler, 37 S. C. 457, wrote the opinion, also, in Bates v. Taylor, 28 S. C. 476, where he quoted from Attorney General v. Jolly, 1 Rich. Eq. 99, 42 Am. Dec. 349, with approval.

After a long and patient investigation of the authorities upon this question, we have reached the firm conclusion that the judgment of the circuit court should be affirmed, and it is so ordered.

Judgment affirmed.

TRUSTS.—COURTS WILL NOT ALLOW A CLEAR TRUST TO FAIL for want of a trustee: *Randolph v. East Birmingham Land Co.*, 104 Ala. 355; 53 Am. St. Rep. 64, and note. A trust will not be permitted to fail through the failure or disability of the trustee to execute the trust, but will be supported upon the intention of the testator that the trust is attached to and fastened to the land, and that the land remains chargeable with it in the hands of the heirs or devisees: *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 495. See *Brandon v. Carter*, 119 Mo. 572; 41 Am. St. Rep. 673, and note.

CHARITIES—DEVISES TO UNINCORPORATED SOCIETIES.—The question as to whether unincorporated societies can receive bequests to charitable uses is a controverted one: Extended note to *Bridges v. Pleasants*, 44 Am. Dec. 101. In Massachusetts, bequests to charitable purposes are valid though the charity is to be distributed by an unincorporated society and no person is in esse who can be a cestui que use: *Burbank v. Whitney*, 24 Pick. 146; 35 Am. Dec. 312, and note. See *Owens v. Missionary Soc.*, 14 N. Y. 380; 67 Am. Dec. 160, and extended note; *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154.

DEVISES—WHEN VOID FOR UNCERTAINTY.—A devise may be void on account of uncertainty as to the devisee or devisees: *Miles v. Fisher*, 10 Ohio, 1; 36 Am. Dec. 61; *White v. University*, 4 Ired. Eq. 19; 44 Am. Dec. 92. A devise "to the propagation of the gospel in foreign lands" is void for uncertainty in the devisee: *Carpenter v. Miller*, 3 W. Va. 174; 100 Am. Dec. 744; or the uncertainty may be as to subject matter: Extended note to *Bridges v. Pleasants*, 44 Am. Dec. 90.

PEAY v. SEIGLER.

[43 SOUTH CAROLINA, 496.]

STATUTE OF FRAUDS.—LETTERS AND RECEIPTS. though neither are of themselves sufficient, may together make such a memorandum as will satisfy the statute of frauds. Hence, if the owner of land requests another by letter to sell his place at L. on terms stated in the letter, and the agent thus constituted replies that he cannot sell on those terms, but can sell on other terms, which he states, to which the owner replies that he will accept the terms named, one hundred dollars in cash and the same amount each year for three years with interest at eight per cent per annum, and the agent thereupon notifies the purchaser that his offer has been accepted and receives from him his first payment and gives a receipt therefor to him, the letters and the receipt constitute a valid and enforceable contract.

STATUTE OF FRAUDS—PAROL EVIDENCE TO SUPPLY DEFECTS IN MEMORANDUM.—Whenever the writings rolled up-

on show that both parties referred to the same property, parol evidence is admissible for the purpose of designating the particular place both had reference to, and, if it is described as the land of the vendor at L., parol evidence is admissible to prove what land he had there, and, if he had but one parcel, that must have been the one referred to by both parties.

STATUTE OF FRAUDS—AGENTS' AUTHORITY TO SELL WHEN NOT LIMITED BY CONDITIONS RESPECTING THE PURCHASER.—The fact that the owner of lands in authorizing another to sell them for him on credit, added that he expected a mortgage for the unpaid purchase price, and that he wanted a reliable purchaser, one such as the agent thinks will make all payments promptly, does not justify the principal in rejecting a contract of sale because he thinks the purchaser not reliable. The language employed by him indicates that he will permit the agent to determine that question.

STATUTE OF FRAUDS.—IT IS NOT NECESSARY THAT BOTH PARTIES SIGN the contract or memorandum necessary to satisfy the statute of frauds. It is sufficient, in a suit or cross-bill against the vendor of land for specific performance, to show that he signed the contract of sale, for the vendee becomes bound thereby and renders the contract mutual when he brings suit for specific performance, or takes possession of the property under his contract.

STATUTE OF FRAUDS—PART PERFORMANCE.—Though a contract for the sale of land is oral, yet if the purchaser makes partial payments, and under and in pursuance of the contract enters into possession of the property, these acts constitute such part performance of the contract as take it out of the statute of frauds. If the sale is made by an agent, his authority to place the purchaser in possession is established by a letter from the vendor authorizing him to make the sale and suggesting that the property is in possession of a renter whose lease had expired, and that if the sale is made, the agent is authorized to request such renter to vacate at once.

ONE IS NOT A PURCHASER FOR A VALUABLE CONSIDERATION without notice unless he paid the purchase money and acquired a legal title before he had notice of the equity of his adversary.

Specific performance of a contract to sell and convey land may be decreed against the grantee of the vendor, unless he purchased the land, paid the purchase price, and received a conveyance before he had notice of the plaintiff's right.

J. E. McDonald and R. A. Meares, for the appellant.

Ragsdale & Ragsdale, contra.

⁵⁰² **McIVER, C. J.** This action was originally commenced on the thirty-first day of May, 1895, against English P. Jenkins and William J. Seigler, who was his tenant, for the recovery of the possession of a certain tract of land, containing twenty acres, more or less, situate in the county of Fairfield, in Longtown, South Carolina. Seigler having ⁵⁰³ been made a formal party, as tenant in possession, Jenkins alone answered, setting up two defenses: 1. A general denial; 2. That he was the equitable

owner of the land in controversy, under a contract for the purchase of the same from one W. M. Waller, the then legal owner, the terms of which he had complied with, and under which he had entered into possession and made improvements. The plaintiff claimed under a deed from the said Waller, bearing date the seventh day of May, 1895. The case, therefore, presented two issues, one legal and the other equitable; and after the legal issue had been tried by the jury, and a verdict in favor of the plaintiff, the case was then transferred to Calendar 2, for a trial of the equitable issue presented by the answer of defendant, Jenkins. This issue was tried by his honor, Judge Witherspoon, who rendered a decree, overruling the equitable defense set up by defendant, Jenkins, and from that decree this appeal was taken, upon the several exceptions set out in the record. The decree of the circuit judge, together with the exceptions thereto, will be set out in the report of this case.

After the appeal was taken, the defendant, Jenkins, departed this life intestate, leaving as his heirs at law the parties named as such in the title, as set out in "case," and the defendant, Seigler, who administered on his estate. Thereupon, by an order of this court, the appeal was continued in the names of such administrator and heirs at law.

The main question in the case is, whether there was a valid contract for the purchase of the land by Jenkins from Waller prior to the contract by which the plaintiff acquired his deed from said Waller. The undisputed fact is, that the said Waller, then being a resident of the state of Kentucky, on the sixth day of January, 1895, by a letter of that date, requested his friend, Dr. S. S. Linder, then residing in the neighborhood of the land, to sell his place at Longtown, on certain terms therein named. To that letter Linder seems to have replied, under date of the 12th of January, 1895, saying that he could not find a purchaser ⁵⁰⁴ at the price named by Waller, but that he had an offer of \$400, payable one-third cash and the balance in three equal annual installments, with interest at the rate of eight per cent per annum, and recommended the acceptance of the offer. Waller replied, on the 14th of January, 1895, saying, amongst other things: "After consideration, Mrs. W. and myself have concluded to let the property go at the figures mentioned in your letter, namely, \$400, on the following terms: \$100 spot cash and \$100 per year for three years, at eight per cent per annum. The party who is living in the house now has not re-rented for this year; so, of course, he can give possession right away. I think there will be no difficulty in getting possession within ten days,

if necessary. If you make the trade, this will authorize you to request the party to vacate the house at once. . . . I want a mortgage on the property until it is paid for." Upon receipt of this letter, Linder at once notified Jenkins that his offer had been accepted by Waller, asking him to come to town and make the cash payment. Jenkins came on the 17th of January, 1895, made the cash payment, and took from Linder a receipt, of which the following is a copy: "Ridgeway, S. C., January 17th, 1895. Received from E. P. Jenkins \$100, as first payment in full on Waller land in Longtown, S. C. (Signed) S. S. Linder, agent for Will. M. Waller." On the same day, Linder notified the tenant on the land, John Smith, in writing, that he had sold the land to Jenkins, and to yield the possession to him. The tenant, John Smith, testifies that Jenkins took possession of the land on the 17th of January, 1895, which he surrendered to him upon the receipt of the note from Linder directing him to yield the possession to Jenkins, though it seems, from the testimony of Jenkins, that he did not immediately turn Smith out, but allowed him to remain there a few days, as he had no place to go to; so that Jenkins did not actually move to the place until the 27th of January, 1895. As soon as Linder had thus closed the trade with Jenkins, he immediately wrote Waller, informing ~~505~~ him what he had done, inclosing the draft of a deed to Jenkins for Waller to execute. To this letter Waller replied, under date of the 21st of January, 1895, saying, amongst other things: "Your letter of January the 17th received. I cannot accept an offer from Jenkins, as I do not consider him reliable. I had no idea, when you wrote me of the offer made for the place, that it was from Jenkins. You will recollect that I stated in one of my letters to you that of course the party must be a reliable person." Then, after speaking of some negotiations between himself and the plaintiff, Nicholas A. Peay, Jr., for the purchase of the place, he uses the following language, the important significance of which will be seen presently: "I think Nicholas will take the place; but if he does not, I prefer to rent again rather than sell to Jenkins." This language shows conclusively that Waller had not at the date of that letter—the 21st of January, 1895—made any contract with the plaintiff for the sale of the land in question. There was also testimony tending to show that the plaintiff, as far back as December, 1894, had been negotiating by letter with Waller for the purchase of the place; but the testimony of the plaintiff himself was exceedingly indefinite and unsatisfactory, to say the least of it, as to when the terms of the purchase had been agreed upon; the plaintiff finally say-

ing that this would be shown by the letters which he had placed in the hands of his attorneys, but which letters were not offered in evidence—the only letter from Waller to plaintiff, bearing date the 19th of December, 1894, which was offered in evidence, showed that Waller had explicitly declined to accept plaintiff's proposition. Indeed, so far as appears from the testimony set out in the "case," there is no evidence as to when the trade between Waller and plaintiff was closed, except the deed, which bears date the 7th of May, 1895, long after the contract with Jenkins had been closed and he put into possession by Waller's agent, Linder, and long after he, Jenkins, had ⁵⁰⁸ complied with the terms of the contract by making the required cash payment.

The first inquiry is, whether there was a sufficient memorandum in writing of the contract between Waller, through his agent, Linder, and Jenkins, for the sale of the land. As was said in *Kennedy v. Gramling*, 33 S. C. 383, 26 Am. St. Rep. 676, "it is not and cannot be denied that a valid contract for the sale of real estate may be made out by putting together a letter of the defendant to the plaintiff, and the plaintiff's reply thereto, or vice versa, provided all the essential terms of the contract can be gathered from the terms of such letters." Now, in this case, it is clear that all of the essential terms of the contract here in question can be gathered from the correspondence between the vendor, Waller, and his agent, Linder, and the receipt given for the cash portion of the purchase money. Waller unquestionably requested and authorized Linder to sell his place at Longtown, by his letter of the 6th of January, 1895, upon certain terms therein specified, and the only restriction he then imposed was expressed in these words: "Of course, I want a reliable purchaser, one whom you think would make his payments promptly." In accordance with this request, Linder undertook to sell the land, "and had tried to sell to two other parties before he offered the land to Jenkins, but could not sell to them at the same price offered by Jenkins." He then, as it seems, by letter of the 12th of January, 1895, communicated to Waller the offer which had been made by Jenkins, and Waller, by his letter of the 14th of January, 1895, accepted the terms offered, repeating the same, and saying in that letter that he wanted a mortgage on the property until it is paid for. Thereupon Linder closed the trade with Jenkins, receiving the cash payment, giving his receipt therefor as the agent of Waller, and put Jenkins in possession of the land. We do not see how it can be doubted that these letters and this receipt showed all of the essential terms of the

contract; the property sold was referred to in terms much more specific, "the ⁵⁰⁷ Waller land in Longtown, S. C.," than were found sufficient in *Neufville v. Stuart*, 1 Hill Eq. 159, in which the offer, made by letter, was "for the settled plantation on which Mr. Neufville resided, containing 869 acres," which was accepted by letter, reciting the terms of the offer, and more specific than was found sufficient in *Kennedy v. Gramling*, 33 S. C. 383, 26 Am. St. Rep. 676, in which the contract was made by letters, the only description of the property referred to was the statement in the vendee's letter making his offer, that if his offer was not accepted, he was ready, at any time, to settle for the year's rent, and this was regarded as sufficient to show that both parties, in their letters, referred to the same piece of property, to wit, the property previously rented by the vendee from the vendor. This court, in passing upon this particular question, used the following language in that case: "It is true that no particular piece of property is, in terms, specified in either of the letters, and if there is nothing in the letters designating the particular property for which the offer is made and accepted, that would be fatal to the validity of the contract": Citing the cases of *Church of Advent v. Farrow*, 7 Rich. Eq. 378; *Hyde v. Cooper*, 18 Rich. Eq. 250; *Hurbert v. Brisbane*, 25 S. C. 506, relied upon by counsel for respondent in this case. "But while parol evidence is inadmissible to supply an omission in the writing of any reference to the particular property referred to, yet such evidence is competent to show the situation and surrounding circumstances of the parties, and thereby identify the particular property referred to in writing. Thus, where there is a proposition to sell and an agreement to buy the house in which plaintiff resides, there is no doubt that parol evidence would be admissible to show in what particular house he did reside, as there could not be a shadow of doubt that both the parties—the one in making the offer and the other in accepting it—had reference to the same property, and that is the great point. Hence, it may be stated as a rule that whenever the writing or writings relied upon show, in themselves, that both parties referred ⁵⁰⁸ to the same property, then the requirements of the statute are fulfilled, and parol evidence may be resorted to for the purpose of designating what particular piece of property both parties had reference to; but where it does not appear from the writings themselves what property was referred to by the parties, then parol evidence is not competent to show that fact. In other words, the writings relied upon must, in and of themselves, furnish the evidence that the minds of the parties

met as to the particular property which the one proposed to sell and the other agreed to buy; and, when such evidence is not found in the writings, it cannot be supplied by parol, but when it is found there, then parol evidence of extrinsic circumstances may be resorted to for the purpose of specifically designating the property to which both parties are shown to have referred by the terms of the writings." These views are fully sustained by text-writers of high authority: Pomeroy on Contracts, secs. 90, 152; Fry on Specific Performance, sec. 209; Browne on the Statute of Frauds, sec. 385. See, also, what is said by Harper, Ch., in *Hatcher v. Hatcher*, McMull. Eq. 319. Now, in this case there can be no doubt that the letters and receipt show beyond dispute that the land which Waller offered to sell, and which Jenkins agreed to buy, was the same land—the Waller land at Longtown, South Carolina—and was so referred to in the writings; and surely, in the absence of any evidence that Waller owned any other lands at Longtown, there could be no doubt that both parties referred to the land here in question. The fact that the name of the proposed purchaser was not mentioned when the offer was communicated to Waller cannot affect the question, in view of the fact that the name of the purchaser was stated in the receipt for the cash payment, which was signed by Linder as the agent of Waller, and, therefore, to be regarded as his act. The fact that Waller, in accepting the offer, stated that he would expect a mortgage to secure the payment of the deferred payments, upon which the circuit judge seems to lay some stress, does not seem to us a matter of any importance; 500 for, in the first place, Jenkins could not give a mortgage until he had obtained a deed, and this Waller declined to execute. But, in the second place, and what is more to the point, when Jenkins made the contract and entered into possession, after having made the cash payment required, the relations between the parties became that of mortgagor and mortgagee, and in equity Waller had a lien on the land for the deferred payments; so that, in reality, he had what he wanted: See 1 Pomeroy's Equity Jurisprudence, secs. 368, 372. The other objection, that Waller required a reliable purchaser, and that he did not consider Jenkins reliable, is very properly disposed of by the circuit judge. Besides, Waller, in making this requirement, defines what he means by a reliable purchaser—"one whom you [Linder] think would make his payments promptly"—and Linder says he so regarded Jenkins, and the evidence fully bears him out in so saying. Jenkins made the cash payment very promptly, and he also made the next payment two days before maturity, which,

however, having been made after Linden's agency had been revoked, and after this action had been commenced, cannot affect this case further than to show that Jenkins was a reliable purchaser, as defined by Waller.

If it should be said that the requirements of the statute of frauds were not fulfilled because Jenkins signed no writing binding him to the performance of the contract, a conclusive answer would be found in the case of *Sams v. Fripp*, 10 Rich. Eq. 459, where the following language will be found: "It has always been held that the requirements of the statute of frauds, concerning agreements to convey lands, were fulfilled by the signature to the contract of the party to be bound, where the adverse party, by bringing his bill, or any writing, affirms the contract." Here Jenkins has certainly affirmed, in writing, the contract in his answer, and asked that it be enforced. It must be concluded, therefore, that the requirements of the statute of frauds were fully complied with in ⁵¹⁰ this case, and that the circuit judge erred in holding otherwise.

The cases cited by respondent's counsel to show that the writings here relied upon do not fulfill the requirements of the statute, do not, in our judgment, sustain such position. In *Meadows v. Meadows*, 3 McCord, 457, the sale was at auction, and the entry was made by the clerk and not by the auctioneer, which entry was in these words: "The tract of land to Wm. Meadows, Jr., at \$5.48." It was held: 1. That the clerk was not the agent of the parties, and, therefore, not authorized to make the entry; 2. That the entry was not sufficient, because there was nothing in it to indicate what tract of land was offered for sale, or what was the number of acres; to which may be added there was nothing to show the amount of the purchase money, for the price set down was, manifestly, the price per acre, and, as the number of acres was not indicated, it would be impossible to ascertain from the entry what was the amount of the purchase money. So that, in that case, the writing relied on failed to indicate two essential terms of the contract—the particular thing sold, and the amount of the purchase money. In *Church of Advent v. Farrow*, 7 Rich. Eq. 378, the bill was for the specific performance of a contract, evidenced by a subscription paper for the building of a church, upon which Mr. Henry subscribed "\$50 and the lot to build on." This was very properly held to be so utterly indefinite as to be incapable of enforcement. For the writing did not, in any way, indicate the extent of the lot—whether one acre or half an acre or what area—or where it was to be located. In *Hyde v. Cooper*, 13 Rich. Eq. 250, the writ-

ing was in the form of a receipt for \$100 in part payment of the purchase money (\$1,300) "of a tract of land, to be defined according to lines and corners previously agreed upon." There the writing afforded no indication as to how much land was intended to be sold, or where it was located; and, of course, it was held that the requirements of the statute were not fulfilled. Indeed, the ⁵¹¹ pleadings in that case showed that the parties differed widely as to the lines and corners said to have been previously agreed upon; and hence, without resorting to parol evidence to explain what the parties had agreed upon, which was clearly incompetent, it would have been impossible to have framed a decree for specific performance. In *Mims v. Chandler*, 21 S. C. 480, the writing relied on was in the form of a receipt, in these words: "Received of Timothy Mims \$285, to be placed on land papers," but what land papers, or what land was referred to, the receipt afforded no indication whatever. Hence it was held that the writing was insufficient. In *Humbert v. Brisbane*, 25 S. C. 506, the writing relied on was a receipt, in the following words: "Charleston, January 23d, 1874. Received of James Brisbane \$90 on account of the purchase of thirty acres of land, the balance of \$70 is due January 1st, 1875, when I will make good titles. (Signed) J. M. Humbert." The court held that this writing did not satisfy the requirements of the statute of frauds, saying, in that receipt "there is no such description or designation of the land proposed to be sold as would enable a court to decree a conveyance. There is nothing but a bare statement of the number of acres, but where it is located or what are its boundaries is left wholly uncertain." In *Boozer v. Teague*, 27 S. C. 363, the writing relied upon was a letter which did not show the very material matter—the amount to be paid—and, for that reason, was held insufficient to satisfy the requirements of the statute. But in the case now under consideration all the essential terms of the contract—the amount of the purchase money, and the installments into which it was to be paid, the rate of interest on the deferred payments, the name of the purchaser, and the location of the property sold—can all be definitely and certainly learned from the writings relied upon—the letters and the receipt for the cash portion of the purchase money, and hence the requirements of the statute of frauds are fully satisfied.

But even if it could be held that the requirements of the ⁵¹² statute had not been complied with, it seems to us that the testimony was quite sufficient to show such a part performance of the contract on the part of Jenkins as would take this case out of the operation of the statute, and entitle him to a decree for

specific performance. It is not and cannot be denied that on the 17th of January, 1895, Linder, as the duly authorized agent of Waller, the then owner of the land, made a verbal contract with Jenkins for the sale of the land, and that, in pursuance of that contract, Jenkins, on that day, paid in cash so much of the purchase money as was required to be paid by the terms of the contract. And we think that the evidence shows that on the same day Jenkins went into possession under said contract, made improvements on the land, and had since retained the possession. This was entirely sufficient to show such a part performance of the contract as would take the case out of the operation of the statute of frauds: See *Mims v. Chandler*, 21 S. C. 492, and the authorities there cited. It is true that the circuit judge, in his decree does say that while Linder was duly authorized by Waller to sell the land, he was not authorized to put the purchaser into possession, and hence, we suppose, the view of his honor was that the possession taken under the authority of Linder was wrongfully taken. With all due deference, it seems to us that the view taken by the circuit judge was based upon a misconception of the testimony. In the letter of Waller to Linder, under date of the 14th of January, 1895, accepting the offer communicated by Linder, he says, amongst other things, "The party who is living in the house now has not re-rented for this year; so, of course, he can give possession *right away*. I think there will be no difficulty in getting possession within ten days, if necessary. If you make the trade, *this will authorize* you to request the party to vacate *at once*."

This, especially the words we have italicized, was amply sufficient to justify Linder in supposing that he had full authority to put the purchaser in possession "*at once*," and ⁵¹³ accordingly he did just what he was directed by Waller to do, requested the tenant in possession of the house to vacate at once, and turn over the possession to the purchaser, Jenkins. It is clear from this letter that Waller intended his agent, Linder, to understand, and it is equally clear that such agent did understand, that if the proposed trade was made, the purchaser was to have possession "*right away*"; and there is nothing whatever in that letter calculated to convey the impression that there was to be any delay in giving the purchaser immediate possession; certainly nothing to convey the impression that possession was to be withheld until the titles were executed and a mortgage given. The expression, "I think there will be no difficulty in getting possession within ten days, if necessary," was doubtless prompted by some notion that the tenant would or might refuse to surrender the

possession "at once," and then it might be "necessary" to institute some proceeding to eject him. At all events, there is not the slightest indication in that letter of any intention on the part of Waller that Linder should not give the purchaser possession until titles were made, for, if that had been Waller's intention, it would have been very easy and most natural for him to have said so. But, instead of so saying, the language used shows that Waller intended possession to be given "right away." We are obliged to say that the testimony in the case is well calculated to convey the impression that Waller so much preferred to sell to the plaintiff rather than to Jenkins that he was willing to sell to the plaintiff on much less favorable terms than those offered by Jenkins, inasmuch as by his agreement with the plaintiff he lost the interest on the purchase money from the 17th of January to the 7th of May, 1895, and then agreed to take interest at a rate three per cent less than that which Jenkins had agreed to pay, and that he endeavored by afterthought to justify his refusal to abide by the contract made with Jenkins by his duly authorized agent.

If then, as we have seen, the contract with Jenkins was ⁵¹⁴ valid, either under the statute of frauds or by reason of such a part performance as would take the case out of the operation of the statute of frauds, then Jenkins, on the 17th of January, 1895, became the equitable owner of the land, and, as such, became entitled to demand specific performance of the contract, by the execution of a conveyance from the holder of the legal title of such land. If authority be needed for this proposition, it may be found in sections 368 and 372, above cited, from 1 Pomeroy's Equity Jurisprudence, as well as in our own cases of *Roberts v. Smith*, 21 S. C. 455, *Sweatman v. Edmunds*, 28 S. C. 58, and *Watts v. Witt*, 39 S. C. 356.

While this would be conclusive as to Waller, if he still held the legal title, the only remaining inquiry is, how this doctrine affects the plaintiff, who is now the holder of the legal title. If he could be regarded as a purchaser without notice of the equitable title of Jenkins, his right would, unquestionably, prevail. But, unfortunately, he cannot be regarded as a purchaser for valuable consideration without notice, for several reasons. In the first place, the testimony conclusively shows, and the circuit judge so finds, that he had actual notice of the equity of Jenkins long before he acquired the legal title, and before he had paid a single dollar of the purchase money. The well-settled rule is, that a person, in order to claim the protection of the plea of purchaser for valuable consideration without notice, must not only have acquired the legal title, but must also have paid the pur-

chase money, before he has received notice of the equity of his adversary: *Bush v. Bush*, 3 Strob. Eq. 134; 51 Am. Dec. 675; *Lynch v. Hancock*, 14 S. C. 90. If it should be said that the plaintiff had been negotiating with Waller for the purchase of the land before Jenkins made his contract, and thereby acquired some equity prior to that of Jenkins, the conclusive answer would be that the testimony not only fails to show this, but shows the contrary.

It does appear that some time in December, 1894, the plaintiff had made an offer to Waller for the land, but the ⁵¹⁵ letter of Waller, under date of the 19th of December, 1894, above referred to, conclusively shows that such offer was declined by Waller, and we find no testimony on the part of the plaintiff showing when he renewed the negotiation—the testimony of the plaintiff himself failing to fix any date—he referring to letters in the possession of his attorneys as showing the date, which letters were not introduced in evidence. So that it cannot be said that the testimony shows that the plaintiff had acquired any equities by his negotiations with Waller, before the contract was made with Jenkins. Indeed, as we have said above, the letter of Waller to Linder, under date of the 21st of January, 1895, conclusively shows that the plaintiff had not, at that date, made any contract with Waller; and that was four days after the contract made with Jenkins. The circuit judge, in finding “that plaintiff had notice, when he took title from Waller, that Jenkins had bought the land from Linder,” also finds “that when Jenkins claims to have purchased from Linder, January 17, 1895, he also knew that plaintiff had been unsuccessfully negotiating with Waller for the purchase of the land, and that he then knew that plaintiff had rented the land for the year 1895”; and he adds that he did not think that Jenkins was in a position to claim any advantage in equity over the plaintiff on the ground of notice. Now, if Jenkins had notice that the plaintiff had been unsuccessfully engaged in negotiating with Waller, that certainly would not have been any notice of any equity thereby acquired by plaintiff, for it would be a contradiction in terms to say that a party had acquired an equity by an unsuccessful negotiation. And as to the notice that plaintiff had rented the land, while the testimony is, to say the least of it, very doubtful whether Jenkins knew that plaintiff had rented the land when he made his contract for the purchase, yet, even conceding that to be the fact, we are unable to perceive how that would confer any equity upon the plaintiff.

If, then, the plaintiff cannot be regarded as a purchaser for ⁵⁷⁶valuable consideration without notice, he cannot be regarded as standing in the shoes of his grantor, Waller, who, as we have seen in the authorities cited, held the legal title as trustee for Jenkins, with a lien on the land to secure the payment of the unpaid purchase money, and hence the plaintiff holds the legal title merely as trustee for Jenkins, which he is bound to convey to Jenkins, or, he being dead, to his heirs at law upon the payment of the balance due under the contract made with Jenkins: See 2 Pomeroy's Equity Jurisprudence, sec. 688; Adams' Equity, 332, *152; 2 Story's Equity Jurisprudence, sec. 784. See, also, Masey v. McIlwain, 2 Hill Eq. 426.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court, with instructions to render a decree requiring the plaintiff to convey the legal title to the land to the heirs at law of English P. Jenkins, upon the payment, within such reasonable time as may be appointed for that purpose, of the balance due on the purchase money under the contract between said Jenkins and the said Waller, through his agent, the said Linder.

CONTRACTS—STATUTE OF FRAUDS—MEMORANDUM.—Several papers signed at the same time by the party sought to be charged may be considered and used together to complete the memorandum required by the statute of frauds: *Lee v. Butler*, 167 Mass. 426; 57 Am. St. Rep. 466, and note.

CONTRACTS—STATUTE OF FRAUDS—MEMORANDUM—PAROL EVIDENCE.—Parol evidence may be introduced to show the situation of the parties and the circumstances attending the transaction for the purpose of applying the contract to a subject matter and establishing the connection of the different writings connecting the memoranda with one another: *Lee v. Butler*, 167 Mass. 426; 57 Am. St. Rep. 466, and note.

BONA FIDE PURCHASER—WHO IS.—To entitle one to protection as a bona fide purchaser, he must have parted with his consideration before notice of a prior conflicting right: *Doran v. Dazey*, 5 N. Dak. 167; 57 Am. St. Rep. 550, and note. See, also, *Anderson v. Blood*, 152 N. Y. 285; 57 Am. St. Rep. 515, and note.

SPECIFIC PERFORMANCE.—A vendee of one who has agreed to convey real property may, unless he is a purchaser in good faith and without notice, be compelled to perform the contract of his vendor: *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47, and note. See, also, *Tate v. Pensacola Gulf etc. Co.*, 37 Fla. 439; 53 Am. St. Rep. 251, and note.

VENDOR AND PURCHASER—STATUTE OF FRAUDS—PART PERFORMANCE.—A contract for the sale of land, invalid for the want of sufficient memorandum, is not rendered obligatory by the payment of the purchase money, in whole or in part, unless the purchaser has also, in pursuance of the contract, entered into possession of the land: *Nelson v. Shelby Mfg. etc. Co.*, 96 Ala. 515; 38 Am. St. Rep. 116, and note. See, also, *Washington v. Soria*, 73 Miss. 665; 55 Am. St. Rep. 555, and note; *Cutler v. Babcock*, 81 Wis. 195; 29 Am. St. Rep. 882, and note.

CASES
OF THE
SUPREME COURT
OF
SOUTH DAKOTA.

HORMANN v. SHERIN.

[8 SOUTH DAKOTA, 86.]

EXECUTION AGAINST THE PERSON WHERE SEVERAL CAUSES OF ACTION ARE JOINED in a complaint may be issued, if the special verdict shows that the cause found in favor of the plaintiff is one which entitles him to such an execution, though the other cause alleged was of a different character.

EXECUTION AGAINST THE PERSON MAY ISSUE ON A judgment for the conversion of personal property under the statutes of South Dakota.

EXECUTION AGAINST THE PERSON, SPECIAL ORDER OF COURT NOT NECESSARY.—If a judgment is for a cause of action warranting the issuing of an execution against the person of the defendant, the clerk may issue it without any special order from the court or judge, although the defendant has not been previously arrested in the action.

A. Sherin, for the appellant.

Byron Abbott, T. B. McDonough, and Crawford & De Land, for the respondent.

⁸⁶ **KELLAM, J.** While this appeal is entitled as in the original action to which it was supplementary, the matter now before the court is an appeal from an order of the circuit court of Marshall county, refusing to discharge appellant, on habeas corpus, from arrest under an execution against his person. Upon the hearing of the writ there were before the court the ⁸⁷ judgment-roll, including, besides the general verdict, what is termed in the abstract a "special verdict." The complaint alleged several distinct causes of action, the second of which was in effect for money had and received. Appellant contends that, inasmuch as a body execution could not be issued on a judgment upon such cause of action, it cannot issue upon a judgment in an

action in which such cause was one of several, the trial of which resulted in the judgment. This is ordinarily true, but the reason is, that it is impossible to tell upon which or what particular cause of action the judgment rests, and, if the rule were otherwise, a judgment debtor would be exposed to imprisonment on account of a cause of action for which imprisonment is not allowed by law. But here the special verdict distinctly shows upon which cause of action, and upon what facts, the general verdict and the judgment rests. It finds that defendant converted to his own use certain enumerated promissory notes and county warrants of the plaintiff. The aggregate amount of these notes and warrants, as listed in the special verdict, make up just the amount of the general verdict, leaving no doubt that they found their general verdict upon the first cause of action, and upon that alone. The verdicts would not fit and could not reasonably follow either of the other causes of action stated in the complaint, for that was the only one alleging conversion of notes and warrants. We think, with appellant, that upon this record such an execution could not rest upon either of the conditions named in the second subdivision of section 4945 of the Compiled Laws, for the reason, among others, that while it is alleged in the complaint that the property claimed to be unlawfully converted by the defendant was received by him as an attorney and agent of the plaintiff, the answer denies such allegation, and the verdict does not find upon or settle that issue. It simply finds the fact of conversion. Such verdict does not establish any fiduciary relation between the parties, and so does not bring the case within the scope of said second subdivision. The general verdict, however, explained by and ³⁸ resting upon the special verdict, does establish the first cause of action alleged—the wrongful conversion of notes and warrants belonging to the plaintiff. By the first subdivision of said section 4945, this is ground for arrest, and by section 5115 an execution may issue against the person, although there had been no previous order of arrest, if “the complaint contains a statement of facts showing one or more of the causes of arrest required by said section 4945.” The complaint does state all the facts necessary to constitute a cause of action for conversion. The cause of action stated in the complaint, and the cause for arrest as named in the statute, are identical. Upon a judgment in such action, execution against the person may issue: *Winton v. Knott*, 7 S. Dak. 179; *Wesson v. Chamberlain*, 3 N. Y. 331; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Lembke’s case*, 11 Abb. Pr., N. S., 72.

Appellant further contends that, without an order of the court or judge, there being none in this case, the clerk had no authority to issue execution against the person, there having been no previous order of arrest. While we think that it might be a safer practice to obtain an order in such case, we find nothing in the statute indicating that such leave is necessary. In respect to issuance by the clerk, the statute seems to make no distinction between an execution against property and an execution against the person. Under similar statutory provisions, the New York courts have often held, though not without an occasional intimation to the contrary, that no order or leave of court was necessary: *Ginochio v. Figari*, 4 E. D. Smith, 227; *Alden v. Sarson*, 4 Abb. Pr. 102; *Kloppenburg v. Neefus*, 4 Sand. 655; *Lockwood v. Van Slyke*, 18 How. Pr. 45. In the latter case, Marvin, J., said: "The code has made no provision for applying to the court or judge for leave to issue a *capias ad satisfaciendum*. If the right exists in this case, it is without reference to any order, and the plaintiff may exercise the right. He will act, however, at his peril." We find nothing in the record that would justify a reversal of the order appealed from, and it is affirmed.

All concur.

EXECUTION AGAINST THE PERSON.—Imprisonment under several executions, some of which are void, is justified if any one of the executions standing alone would have justified it: *Lewis v. Avery*, 9 Vt. 287; 30 Am. Dec. 409.

EXECUTION AGAINST THE PERSON.—The arrest of the judgment debtor is one mode authorized by law for the collection of the debt: *Hobson v. Watson*, 34 Me. 20; 56 Am. Dec. 633.

EXECUTION AGAINST THE PERSON.—As to what irregularities will not avoid an execution against the person, see *Woolford v. Patten*, 2 Abb. 131; 35 Am. Dec. 52; *Trull v. Howland*, 10 Cush. 109; 57 Am. Dec. 82.

METCALF v. NELSON.

[8 SOUTH DAKOTA, 87.]

REAL ESTATE, WATER, WHEN A PART OF.—Subterraneous water not flowing in a definite course or channel, but percolating and seeping through the earth, is a part of the realty. It belongs to the owner of the land as much as the rocks or stones in it.

SPRINGS OF WATER ARE OF TWO CLASSES, those which are fed by the seeping of water generally through the surrounding earth, and those which are formed by the breaking out upon the surface of a definite underground watercourse. The latter are governed by the same rules of law as surface streams.

SPRINGS OF WATER, PRESUMPTION AS TO CHARACTER OF.—It will be presumed, in the absence of evidence, that a

spring is formed and fed by percolating waters, rather than by the outbreak upon the surface of the earth of a subterranean stream.

SPRINGS, PROPERTY IN WATERS OF.—The owner of land upon which a percolating stream appears is entitled to the waters thereof, and may recover damages from a person seeking to carry them away.

DAMAGES, PRESUMPTION OF.—From the carrying away of water from a spring upon the plaintiff's land damage to him is presumed, though not expressly averred.

Palmer, Preston & Rodge, for the appellant.

R. W. Hobart and Bailey & Voorhees, for the respondent.

SS KELLAM, J. While some question is made as to the sufficiency of the description as set out in the complaint, we think it is sufficiently definite for the purpose of this action, and shall treat the complaint as alleging that the plaintiff, who is now appellant, was at the time mentioned the owner of a parcel of land upon which was located a spring of water, and that without his consent and against his objection the defendant removed from said spring and hauled away a large quantity of water for his own use and for purposes of sale, and that the value of the water so taken was five hundred dollars, for which amount judgment was demanded. At the trial the court sustained defendant's objection that the complaint did not state facts constituting a cause of action, and rendered judgment for defendant. Plaintiff appeals.

The grievance complained of is not the trespass upon or injury to plaintiff's real estate, but the asportation of water issuing from said spring, and claimed to belong to plaintiff. **SS** The interesting question therefore is, Did the plaintiff have such property rights in and to the corpus of the water in such spring as would entitle him to recover for what was carried away? Subterraneous water, not flowing in a defined course or channel, but percolating and seeping through the earth, is a part of the realty. This is statutory here (Comp. Laws, sec. 2771), and is the law generally. In *Wilson v. New Bedford*, 108 Mass. 265, 11 Am. Rep. 352, the court said: "The percolating water belongs to the owner of the land as much as the land itself, or the rocks and stones in it." To the same effect are *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; *Delhi v. Youmans*, 45 N. Y. 362; 6 Am. Rep. 100; *Frazier v. Brown*, 12 Ohio St. 294; *Emporia v. Soden*, 25 Kan. 588; 37 Am. Rep. 265; *Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 615; *Clark v. Conroe*, 38 Vt. 469; *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114. As to the water rights of owners of land in which springs are located, the authorities distinguish between springs that are fed by the seeping of water generally

through and from the surrounding earth and those that are formed by the breaking out upon the surface of definite underground watercourses; the latter being governed by the same rules of law as surface streams. For a collection of cases exemplifying this distinction, see note to *Wheatley v. Baugh*, 64 Am. Dec. 727. In the absence of evidence, it will be presumed that the spring was formed and fed by the percolation of water through the surrounding soil, and was not the outbreak upon the surface of a subterranean stream: *Hanson v. McCue*, 42 Cal. 303. In *Elster v. Springfield*, 49 Ohio St. 82, it was said that, as it was not shown from what source the spring was supplied, it would be inferred that it came from percolation through the earth in the vicinity of the spring: See, also, *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276. As the hidden water in the plaintiff's soil belonged to him as a part of it, he might, by artificial means, separate it from the soil, and it would still belong to him. He might sink a well, into which such water would work its way, and the accumulation in the well would still be his, and ⁹⁰ subject to his proprietary control: *Davis v. Spaulding*, 157 Mass. 431. If the water which fills this spring is not subject to the law of running streams, but to that of percolating water, did the plaintiff lose his ownership of it when it appeared upon the surface? If a cloud had burst on plaintiff's land, and filed a cavity thereon with rain, it would, while so confined, belong to plaintiff, and we are unable to see why or how the question of ownership can be made to depend upon which way the water comes from. Suppose this percolating water appeared at the surface only at the point of the spring, and at once sunk away again into the surrounding soil, resuming its character of wandering, seeping water, would the plaintiff's proprietary rights come and go with the appearance and disappearance of the water? It must be remembered that we are not dealing with a running stream, or with riparian rights, but simply with percolating waters which have combined and struggled to the surface on plaintiff's land. We think the plaintiff had more than the ordinary usufruct in the water of this spring, so long, at least, as it was held in the spring. He might consume or dispose of it all if he chose. He might convey it away in pipes, or carry it off in tanks. If medicinal, he might bottle it, and sell it for the healing of the nations. It would be inconsistent with the maintenance of such right in plaintiff to allow that the defendant or any other stranger had also the right, in hostility to the plaintiff, to take and carry away water from the same spring.

While it may not be technically correct to say that the landowner is the absolute owner of percolating waters gathered into

a spring or well, such is often the expression of the courts and text-writers; and probably means what, in respect to water, is practically equivalent to ownership—the exclusive right to use and dispose of it. While the precise question presented by this case appears to be novel, there are many cases which recognize the right of the owner of land upon which a spring so appears to sell and dispose of the right to all or a portion of ⁹¹ the water it supplies: See *Buffum v. Harris*, 5 R. I. 243; *Bliss v. Greeley*, 45 N. Y. 671; 6 Am. Rep. 157; *Clark v. Conroe*, 38 Vt. 469. Applying these views to the facts stated in the complaint, we think the conclusion must be that plaintiff had such an ownership of or interest in the waters in this spring as entitled him to the exclusive right to use and dispose of it. While the complaint does not expressly aver damages or detriment to the plaintiff in the hauling away by the defendant of water from the spring, we think it does show an invasion of the plaintiff's right, from which the law presumes damage: 5 Am. & Eng. Ency. of Law, 2, and cases cited. Under our practice, every action is an action on the case, and, while it may be that the plaintiff is not entitled to recover specifically for so many gallons of water taken from the spring, we think the complaint shows a right in plaintiff, and a violation of it by defendant. It seems to us that the complaint states facts which, if proved, would entitle the plaintiff to at least nominal damages. Whether he can or ought to recover more is for him to demonstrate in the trial court.

This case does not present the question of whether, after trial, a judgment for defendant ought to be reversed, because, on the facts proved, the plaintiff ought to have had a judgment for nominal damages. The question here is purely a legal one. To sustain this judgment we must say as a matter of law that the facts stated in the complaint do not constitute a cause of action; that they do not show a right in plaintiff and a violation of it by defendant. For the reasons stated, we are of the opinion that the circuit court was wrong in the ruling that the complaint did not state facts constituting a cause of action. Its judgment for defendant following such ruling is reversed, and the case remanded for a new trial.

FULLER, J., dissenting. No trespass upon or injury to real property being alleged, and no damages being claimed, it is, in my judgment, obnoxious to the creative plan, and as ⁹² inconsistent with the law of nature, to permit plaintiff to recover for water which he could not use, and did not desire to appropriate, as it would be under similar circumstances to grant him a

money judgment for the value of sunlight or the free air of heaven. There was no usurpation of right, and there is no rule of law by which to grant or measure a recovery, in the absence of any claim or pretense that plaintiff had sustained injury. Assuming, but not conceding, that the complaint in this action, under the liberal view of a majority of this court, states facts which would, if proved, entitle plaintiff to nominal damages, the judgment of the court below ought not to be disturbed. Unless it becomes necessary to preserve or define some legal right clearly invaded or involved, appellate courts do not feel usually called upon to reverse a judgment to enable a party to recover nominal damages: 2 Ency. of Pleading and Practice, 535; *Benson v. Waukesha*, 74 Wis. 31; *Delta Lumber Co. v. Williams*, 73 Mich. 86; *McAllister v. Clement*, 75 Cal. 182; *McCauley v. McKeig*, 8 Mont. 389; *Williams v. Brown*, 76 Iowa, 643.

The judgment of the court below should be affirmed.

WATERS AND WATERCOURSES—SUBTERRANEAN WATERS—WHEN A PART OF THE REALTY.—The principles of law which govern the right to waters flowing upon the surface of the earth are inapplicable to waters which are beneath its surface and percolate through the soil, and the water which is held by the soil, whether sand or sandstone, in a state of percolation is a portion of the soil itself and belongs absolutely to the owner of the land. He may appropriate and divert such water at his pleasure: *Gould v. Eaton*, 111 Cal. 639; 52 Am. St. Rep. 201, and note; *Tampa Water Works Co. v. Cline*, 37 Fla. 586; 53 Am. St. Rep. 262, and note.

WATERS AND WATERCOURSES — UNDERGROUND—PRESUMPTION AS TO CHARACTER.—In the absence of affirmative proof that subsurface water is supplied by a definite flowing stream, the presumption is that it comes from ordinary percolations: *Tampa Water Works Co. v. Cline*, 37 Fla. 586; 53 Am. St. Rep. 262.

WATERS AND WATERCOURSES — UNDERGROUND — BY WHAT RULES GOVERNED.—Subterranean waters, when they flow in clearly defined channels, are subject to the same rules of law that govern waters and riparian rights respecting watercourses above ground; but this is not true if the subterranean waters do not flow in defined channels: *Notes to Collins v. Chartiers Valley Gas Co.* 17 Am. St. Rep. 796, and *Beatrice Gas Co. v. Thomas*, 43 Am. St. Rep. 719.

ADAMS AND WESTLAKE COMPANY v. DEYETTE.

[8 SOUTH DAKOTA, 119.]

CORPORATIONS.—THE PURCHASE OF ITS OWN STOCK by a corporation is necessarily a reduction of its capital, condemned by the plainest dictates of sound policy.

CORPORATIONS.—THE BORROWING OF MONEY by a corporation for the purpose of purchasing its own stock must be treated as ultra vires, at least, as against lenders who knew of such purpose.

CORPORATIONS, UNLAWFUL PREFERENCES.—A judgment confessed by an insolvent corporation in favor of a creditor who loaned it moneys, knowing that they were to be used to purchase its own stock, is an unlawful preference, and will not be permitted to prejudice the rights of other creditors.

NOTICE OF UNLAWFUL PURPOSE, FROM WHAT PRESUMED.—Knowledge on the part of a lender of moneys to a mercantile corporation that they were to be used for the purchase of stock in itself is sufficient to charge him with notice that such an act must work a fraud upon creditors, and is therefore against public policy, and prohibited by law. Neither by the giving of promissory notes for such moneys, nor by confession of judgments thereon can the corporation create any liability capable of enforcement to the prejudice of its creditors.

INSOLVENT CORPORATIONS, PREFERENCES BY.—A judgment confessed by an insolvent corporation with a view to giving a preference to one of its directors is not enforceable as against its other creditors.

Frank A. Luce, for the appellant.

John H. Berry, for the respondent.

120 FULLER, J. This case, now before us on rehearing, is reported in 5 S. Dak. 418, 49 Am. St. Rep. 887, where the unassailed substantive facts are stated as follows: "On the ninth day of May, 1888, the Hicks-Trask Hardware Company, a corporation, being insolvent, confessed judgment against itself in favor of each of the defendants C. E. Deyette and W. W. Lewis, amounting to \$1,469.26; the Deyette judgment being for \$649.84, and the Lewis judgment for \$819.42. After entry of the above judgments, **121** and on the twelfth day of the same month, said defendant confessed numerous other judgments, among which there was one in plaintiff's favor for \$1,319.47. Executions issued in succession, and the property of the defendant corporation was levied upon in the order above indicated, and in the order in which the respective judgments were entered and docketed; and the property of the corporation was found to be insufficient to satisfy the judgments which preceded that of the plaintiff. The referee made, among others, the following findings of fact: '14. That the consideration of the confession of judgment in favor of Charles E. Deyette was as follows: \$514.60, money

loaned to the Hicks-Trask Hardware Company on January 20, 1888, was borrowed by said company for the purpose of using the same to purchase the stock of said company held by Trask, and on account of the indebtedness of \$184.22, owing to said Deyette by said corporation for work and labor done by said Deyette for said corporation; 15. That the defendant Deyette had actual knowledge of the purpose and intent of the said corporation to use the same in the purchase of stock; 16. That the consideration of the judgment of the defendant Lewis was \$514.60, money loaned to the said corporation by him about January 20, 1888, and borrowed by said company for the purpose of using the same in the purchase of stock of said corporation held by Trask; and the sum of \$304.07, due Lewis from said corporation on account of services rendered by Lewis to said corporation; 17. That defendant knew of the purpose and intent for which said money was borrowed by said corporation; 18. That the defendant Lewis, at the time of and prior to the making of said confession of judgment to himself, was a director of said corporation, and secretary thereof, and signed said confessions as secretary on behalf of said corporation; 19. That the defendant Deyette, at the time of said confessions of judgment by said corporation to himself, was not a director; 20. That no written consent of the stockholders of the Hicks-Trask Hardware Company was ever had to the purchase ¹²² of stock from Trask by said corporation; 21. That on May 12, 1888, executions were issued from the district court upon the said judgment of said plaintiff to the sheriff of Brown county, in which said defendant the Hicks-Trask Hardware Company had its place of business; 22. That executions issued from the clerk of the district court of Brown county on each of the judgments of the defendants Foster, Deyette and Lewis, and were by him levied on the personal property of the Hicks-Trask Hardware Company, and all thereof; and the said sheriff sold the same, and holds the money realized from said sale, to be applied on said executions according to the decree of this court; 23. That the proceeds arising from said sale are not sufficient to pay the judgments against the Hicks-Trask Hardware Company prior to the judgment of plaintiff.' Upon these findings of fact the following conclusions of law were based: '2. That the judgment of the defendant Deyette, as to the sum of \$514.60, money loaned to the said corporation for the purpose of purchasing stock, is invalid, for the reason the Hicks-Trask Hardware Company, and the officers thereof, had no power to borrow money for the purchase of its stock; and the defendant, having loaned said money knowing of the illegal pur-

pose for which it was to be used, cannot recover the same from said corporation; 3. That as to the sum of \$134.25, included in the judgment of said Deyette, the same is valid, and should stand, and be enforced for said sum of \$134.25; 4. That judgment of the defendant Lewis is invalid for the reason that the confession of the same, made by him and obtained by him when he was a director of said corporation, was an illegal preference as against the creditors of said corporation, and that the relief prayed by plaintiff should be granted as against said Lewis; 5. I further find as to the judgment of the defendant Lewis that as to the sum of \$514.60 it is invalid for the reason that, as to said amount, the consideration was for money loaned to said corporation by Lewis for the illegal purpose of purchasing stock of said corporation.' Judgment by the court was ¹²³ accordingly entered on motion of plaintiff's counsel, and defendants Deyette and Lewis appeal therefrom."

In order to affirm the contention of appellant's counsel and disaffirm our former conclusion, we must adopt and proclaim a rule by which a corporation without surplus profits or unemployed capital may, in contemplation of insolvency, borrow money with which to purchase shares in itself, and, when insolvency occurs, give a preference to the persons from whom the loan was made, by confessing judgments in their favor for an amount equal to the corporate assets, at a time, for the purpose of, and in such a manner that the rights and claims of bona fide creditors are entirely defeated. In determining the rights of these parties, rules of law and statutory provisions bearing upon the questions presented must be viewed in the relation that each bears to the other; and all must be considered with reference to an enlightened public policy, upon which is based a strong and wholesome rule of law, prohibiting a corporation from distributing its capital among shareholders by the purchase of stock in itself to the inevitable detriment of creditors. As observed by Mr. Thompson in the second volume of his recent commentaries on the Law of Corporations, at page 155: "Stringent precautions to prevent the reduction of the capital of a limited company without due notice and judicial sanction would be idle if the company might purchase its own shares wholesale; and, if it were otherwise, the result would be that the shareholders would receive back the money subscribed, and there would thus pass into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock, available to meet the demands of their creditors. . . . The pur-

chaser of the stock must be one who succeeds to a liability, distinct from and in addition to that of the corporation." Mr. Spelling, after conceding that the foregoing rule is supported by the irresistible weight of authority, and in connection with a suggestion that he can see no valid reason why shares in itself might not be ¹²⁴ purchased by a corporation, provided always that by so doing its capital stock is not diminished and its creditors are not injured, states the rule as follows: "A purchase of shares in itself by a corporation would be ultra vires wherever and whenever the effect would be to diminish its capital and lessen the security of its creditors": 1 Spelling on Private Corporations, 168. Mr. Morawetz says that: "No verbiage can disguise the fact that a purchase by a corporation of shares in itself really amounts to a reduction of the company's assets. . . . The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. It is contrary to the fundamental agreement of the shareholders, and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a fruitful source of unfairness, mismanagement, and corruption. It is for these reasons that a shareholder cannot be allowed to withdraw from the corporation with his proportionate amount of capital, either by a release and cancellation before the shares have been paid up, or by a purchase of the shares with the company's funds." Cases almost innumerable are cited by each author in support of the foregoing rule, based upon the equitable principle that the assets of a corporation are a trust fund for its creditors—a doctrine that so completely pervades and enters into the warp and woof of the law of corporations that no literary effort, by whatever degree of legislative sanction or judicial sagacity aided, can destroy the immutable principles of justice and considerations of public policy from which the doctrine emanates, and upon which the rule is based. For the reason that creditors of a corporation cannot, as in case of a partnership, ultimately look to those who constitute the membership for the payment of their claim, the law requires corporations for profit, as a condition precedent to the commencement of business and for the protection and security of creditors, to have capital stock and shareholders, and to hold that they may, upon the strength of their capital, incur debts in the prosecution ¹²⁵ of legitimate corporate business, and then destroy their assets and the credit of the corporation by borrowing money with which to purchase shares in themselves, and defeat their creditors by confessing preferred judgments in

favor of those who loaned the money with a knowledge of the purpose for which it was to be used, would be to sanction a fraud and judicially approve a vicious species of legerdemain.

Commencing at page 5115 of the fifth volume of his Commentaries, Judge Thompson approves in a vigorous manner the rule adopted by all recent text-writers, which asserts and emphasizes the proposition that the assets of a corporation are a trust fund for its creditors; and, after stating that it is the only doctrine worthy of any respect, proceeds to discuss at length the fallacy by which courts have been led to hold that a corporation anticipating insolvency has the power of a private individual to deal with its assets, and under like circumstances to prefer creditors; and at page 5121 he concludes his observations in part as follows: "It is thus perceived that the courts which have adopted the doctrine that an insolvent corporation may prefer its creditors have jumped at the conclusion by reasoning that, in the absence of statutory prohibitions, a corporation has the same power in disposing of its property that an individual has. But, in adopting this hasty conclusion, they have overlooked the fact that the analogy between an insolvent individual and an insolvent corporation wholly fails in this, that, although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may, by so doing, hinder and delay the others, yet he merely hinders and delays them; he does not, by that act, destroy himself; he still lives; and he may, and often does, get on his feet again, and acquire property, and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the objects of its creation, and dispossesses itself of all its property, it destroys itself, and becomes ipso facto dissolved, and, in fact, is regarded ¹²⁶ as a dissolved corporation for many purposes having reference to the rights of creditors. An assignment for the benefit of creditors is, in point of fact and experience, an end of the corporation; and to this statement there is not one exception in a thousand cases, as every lawyer and judge knows. The corporation, after such a catastrophe, not only has nothing more for its unpreferred creditors, but it will never have anything more for them. Its act of exhausting its assets in preferring particular creditors deprives the others of all remedy, unless in those cases where the law has left them the remedy of proceeding against its stockholders." In determining whether a corporation, organized for the purpose of dealing in hardware at wholesale, has power to borrow money with which to traffic in its own shares, and thereby relieve its stockholders from liability, the question of intent is of no impor-

tance, when the inevitable result must bring disaster to honest creditors. As between them and the money loaner, in case of insolvency, a knowledge of the purpose for which the funds were borrowed is sufficient to at least postpone his claim until they have been paid in full; otherwise it would be a popular scheme for a corporation to incur debts, limited in extent only by its ability to engender confidence, and then, in contemplation of suicidal dissolution, borrow money from some trusted friend with which to purchase its entire stock, upon the assurance that by its last official act and by a judgment timely confessed, the proceeds of the entire assets of the company shall be turned into the pockets of the man who loans the money with a knowledge of such fraudulent purpose, and to the exclusion of honest persons who extended credit, believing that the assets of a corporation are a trust fund for the benefit of creditors. A corporation, as such, has no power, under the statute, to enter into any obligation or contract except such as are necessary and essential to the transaction of the ordinary business for the prosecution of which it was organized; and in recognition of the trust fund doctrine the directors are expressly prohibited ¹²⁷ from diverting, withdrawing, or paying to stockholders any part of the capital stock, and are in their individual and private capacity made jointly and severally liable to the creditors of the corporation, to the full amount so "divided, withdrawn, paid out, or reduced, or debt contracted": Comp. Laws, secs. 2917, 2928. Section 2917 is as follows: "Unless otherwise provided, a corporation may purchase, hold, and transfer shares of its own stock, from its surplus profits, or as provided in the article on the assessment of stocks, or by the unanimous consent in writing of all its stockholders, in such manner and for such price or consideration as the said stockholders may unanimously decide upon." Although, by enabling a corporation to purchase shares of its own stock from its surplus profits, our legislature has to that extent encroached upon the otherwise invariable rule by which all such traffic is prohibited, the foregoing section, construed, as it must be, with other statutory provisions relating to the same subject, is not sufficient to empower a corporation, through the agency of its directors, to "divide, withdraw, or pay to stockholders, or any of them, any part of the capital stock," or to increase its liability by borrowing money with which to purchase shares in itself. This is obvious, because it is "otherwise provided," and because the power is, by the law of corporations, expressly withheld from directors and officers as such, as well as by that portion of section 2917 which authorizes no purchase of stock in any manner, except

from surplus profits, or by virtue of the law of assessment, unless the purchase be made by and through the unanimous consent and united individual action of all the stockholders, evidenced by a stipulation in writing, signed by every member, and specifying the consideration to be paid, and the manner of and the means by which the purchase is to be effected. Without such written consent, the corporation cannot be bound; and in the total absence of express or implied power to borrow money with which to purchase shares in itself, and in the face of the fact that the loaners thereof had actual ¹²⁸ knowledge of the extraordinary use to which the funds were to be applied, their claims are ultra vires, and must not be asserted to the detriment of creditors: *Chawacla Lime Works v. Dismukes*, 87 Ala. 344. Actual notice on the part of one who loans money to a mercantile corporation that the funds so loaned are to be used for the purchase of stock in itself is sufficient to charge him with knowledge that such an unauthorized act works an immediate fraud upon creditors, and is, therefore, against public policy, and prohibited by the law of the land. These promissory notes upon which the Deyette and Lewis judgments were confessed, being ultra vires because the corporation was, under the circumstances, powerless to make them, it follows, of course, that the judgments were void to the extent of the money loaned for a purpose beyond the scope and object for which the corporation was created: *Currier v. Slate Co.*, 56 N. H. 262; *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700; *Pearce v. Madison etc. R. R. Co.*, 21 How. 441; *Pennsylvania Ry. Co. v. Keokuk etc. Bridge Co.*, 131 U. S. 371.

We are fully aware that numerous cases may be found in which judges, though standing upon an eminence, have been unable to observe or unwilling to concede that the assets of an insolvent corporation are a trust fund for the benefit of all bona fide creditors, none of whom, at the hands of a corporation are entitled to a preference; but a careful research discloses no case which goes to the extent of holding that a corporation, apparently in failing circumstances, can borrow money with which to purchase shares in itself, and give to the persons from whom the money is borrowed a preference over all other creditors. Manifestly, a transaction so inconsistent with every consideration of common honesty and public policy, and so disastrous to the credit of corporations, as well as to the rights of those with whom they transact business, cannot receive the stamp of judicial approval.

Adhering substantially to the views expressed in our former opinion, the judgment of the trial court is affirmed.

JUDGE KELLAM dissented. He urged: 1. That section 2919 of the Compiled Laws of the state conferred upon corporations authority to purchase and hold shares of their own stock; 2. That the opinion of the majority of the court was based upon assumed premises, to wit, that the corporation was insolvent, or in contemplation of insolvency, when it purchased its stock, and that the only finding respecting its insolvency was that it existed when the judgments were confessed, nearly four months afterward, and, for aught that appears to the contrary in the record, the insolvency may have resulted from causes occurring after the money was borrowed, and that neither the borrower nor the lender may have known when the loan was made that the corporation was insolvent, or that its surplus profits did not justify the purchase of the stock; and 3. He claimed that the evidence was not such as to show that the lender of the money knew that the purchase of the stock was either unauthorized or illegal, for it was not found that he knew that the consent of the stockholders to the purchase had not been obtained.

The judge also examined what he characterized as the trust fund doctrine, stating that the opinion of the majority of the court was to the effect that a judgment could not be sustained if it was an effort on the part of an insolvent corporation to prefer a creditor, and he insisted that the right of a debtor to prefer one creditor to another was expressly guaranteed to him by statute, and that this right extended to private corporations as well as to individuals, and in support of this view he cited the cases of *Worthen v. Griffith*, 59 Ark. 562; 43 Am. St. Rep. 50; *Catlin v. Bank*, 6 Conn. 233; *Pondville Co. v. Clark*, 25 Conn. 97; *Roseboom v. Whittaker*, 132 Ill. 81; *Peterson v. Tailoring Co.*, 150 Ill. 290; *Kendall v. Bishop*, 76 Mich. 634; *Bank of Montreal v. Potts Co.*, 90 Mich. 345; *Hospes v. Car Co.*, 48 Minn. 174; 31 Am. St. Rep. 637; *Alberger v. Bank*, 123 Mo. 313; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; *Van Alstyne v. Cook*, 25 N. Y. 489; *Hollins v. Iron Company*, 150 U. S. 371; *Graham v. Railway Co.*, 102 U. S. 148; *Gould v. Railway Co.*, 52 Fed Rep. 690. He agreed, however, with the majority of the court with respect to the judgment in favor of Lewis, and which was confessed by him while an officer of the company for the purpose of giving him a preference over other creditors, that it could not stand, because, "while the directors and officers of a corporation, solvent or insolvent, are not in any proper sense the trustees of the creditors, they do occupy a relation to them demanding the utmost good faith on their part in the handling of the corporation assets. To their honest and fair dealing with the property, and to their just and prudent management of the business, the creditors must look for their continued security. As in the case of others occupying a fiduciary position, they cannot innocently sacrifice the interest of those who trust them to their own personal advantage. As managers of the corporation and its property, they owe a duty to those dealing with them, which they violate when, to the detriment of those who confide in them, they make themselves preferred beneficiaries in the disposition of assets which, without such preference, would be available alike to all creditors. They hold in their hands the property of the corporation to which creditors

must look for satisfaction of their claims, and come within the just principle that one who has possession and control of property for the benefit of others besides himself may not dispose of it for his own special advantage, to the injury of others, for which it is also held.

CORPORATIONS—CAPITAL STOCK AS A TRUST FUND.—The capital stock of a corporation is now regarded in equity as a trust fund for the payment of debts. Creditors have a lien upon it which is prior in point of right to any claim which the stockholders as such can have; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund or in any way to place it beyond the reach of creditors: *Buck v. Ross*, 68 Conn. 29; 67 Am. St. Rep. 60, and monographic note, page 66. A corporation has the right, unless forbidden by statute, to acquire shares of its own capital stock; but this right cannot be exercised in derogation of the rights of bona fide creditors: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 69; note to *In re Brockway Mfg. Co.*, 56 Am. St. Rep. 401.

CORPORATIONS—INSOLVENT—RIGHT TO BORROW MONEY TO PURCHASE STOCK.—An insolvent corporation cannot borrow money with which to purchase its own stock, and give to the party advancing the money a preference over other bona fide creditors and defeat their claims by confessing judgment in his favor, when he has actual knowledge of the purpose for which the money was borrowed: *Adams etc. Co. v. Deyette*, 5 S. Dak. 418; 49 Am. St. Rep. 887, and note.

CORPORATIONS—INSOLVENT—RIGHT TO PREFER CREDITORS.—The mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all its creditors; but the prevailing rule is, that the property of an insolvent corporation is a trust fund in such a sense as to preclude the directors and officers of the corporation from dealing with it in such a manner as to secure preferences for themselves, and that such a preference is fraudulent and void as to unsecured creditors: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 77, 78.

CORPORATIONS—INSOLVENT—RIGHT TO GIVE PREFERENCES.—Confession of a judgment by an insolvent corporation in favor of one of its directors will not be permitted to operate as a preference to the prejudice of other creditors: *Hill v. Pioneer Lumber Co.*, 113 N. C. 173; 37 Am. St. Rep. 621.

KEHOE v. HANSEN.

[8 SOUTH DAKOTA, 196.]

MECHANICS' LIENS, WHAT CLAIMS MAY BE SECURED BY.—One who performs services in hauling lumber to premises, to be there used in the erection of a dwelling and other buildings, has a lien thereon under a statute providing that every mechanic or other person who shall do any work upon a building shall be entitled to a lien thereon.

S. H. Cranmer, for the appellant.

C. H. Barron and Albert Gunderson, for the respondents.

196 CORSON, P. J. This was an action to enforce a lien under the mechanics' lien law of this state. Judgment for defendants, and the plaintiff appeals. The cause of action is stated in

the first paragraph of the complaint as follows: "That on ¹⁹⁹ the first Monday of March, 1886, at said Edmunds county, said plaintiff made a certain contract with John Hansen, one of the defendants above named, by which plaintiff agreed to perform certain labor on and about the erection of certain buildings, structures or improvements, to wit, a certain dwelling-house, barn, and granary, situated upon the following described land. . . . Said labor was to be performed by said plaintiff and his team, and by said contract the said defendant John Hansen agreed to pay to the said plaintiff therefor at the rate of three dollars per day for each day's labor so performed by said plaintiff and his team." The usual allegations of filing a verified account and claim for a lien were made, and in conclusion the plaintiff prays for judgment for the amount due, and that the same be adjudged to be a lien upon the property described, etc. The account filed and made a part of the complaint reads as follows: "To hauling lumber with team, 25 days, \$75.00; to interest, \$8.00; to drawing and filing lien, \$5.00." The allegations of the complaint, taken in connection with the account filed, show that the claim for a lien is based upon a contract for hauling the lumber for the buildings erected on the land described.

Upon the trial, the defendants objected to any evidence under the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action. This objection was sustained by the court, and all evidence excluded, and judgment rendered for the defendants. The specific ground of the objection was that the plaintiff could not enforce a lien for hauling lumber for the buildings, such a lien not being given by the terms of our lien law. The theory of the trial court in holding the complaint insufficient evidently was that a person hauling lumber for a building did not come within the terms of the statute, which provides "that every mechanic or other person who shall do any work upon, or furnish material," etc. (Comp. Laws, sec. 5469), is entitled to a lien upon such building, etc. This question has never been passed upon in this state, ²⁰⁰ and is one of much importance. Ordinarily, the contractor for the material delivers the same, and includes the expense of hauling in the price of the material. No objection, so far as we are aware, has ever been made to thus including the expense of hauling in the price of the material. If it may be so included, and the lien made to cover the same, why may not the cartman make a separate contract for hauling, and acquire a valid lien therefor? We can discover no valid reason why, if the contract to haul the lumber is made directly by the owner with the cartman, he may not

enforce a lien therefor. The hauling of the material, in many instances, constitutes a large item in the expense of the building, especially where the same is built of stone or brick. Labor, therefore, in getting the material together upon the ground, ready for the structure, is fairly within the meaning of our mechanic's lien law of work upon the building—work that enters into, and constitutes labor upon, the building. In this view we are supported by the supreme court of Pennsylvania. In *Hill v. Newman*, 38 Pa. St. 152, 80 Am. Dec. 473, this precise question was before that learned court, and the court, speaking through Lowry, C. J., says: "The law is that every building may be subjected to a lien for the payment of all debts contracted for work done and materials furnished for or about its erection, and this may very fairly be taken to include the work of hauling the materials to the place of building. We think we should have to unduly strain the language in order to exclude it. It is work about the erection of the house, and is, of course, charged for by the materialman when he has the lumber, stone, brick, sand, or lime delivered by his own carters. The hauling away of the clay dug out of the cellar and foundation is always considered proper work for him; and we know not why the carter may not be a proper man to claim it, if he did the work at the request of the owner or the contractor, and not as a mere hireling under the contractor, or under a subcontractor. We think, therefore, that this lien ought not to have been struck off." It is true, the language of ²⁰¹ the Pennsylvania statute is somewhat broader and more comprehensive than that used in our statute, but the difference in the language is not such as to require a different decision under our statute. As we have said in former decisions by this court, the mechanic's lien law is remedial in its nature, designed for the protection of a most meritorious class of persons, and should receive a liberal construction in furtherance of the protection of such persons: *Pinkerton v. Le Beau*, 3 S. Dak. 440. We have not overlooked the case of *Webster v. Real Estate Improvement Co.*, 140 Mass. 526, in which the supreme court of that state held that a party hauling lumber or other material for the construction of a building is not entitled to a lien. But the reasoning of the learned court in that case is not satisfactory to us, and the decision does not, in our view, as fully carry out the spirit and intention of the lawmaking power as the decision in the case cited from Pennsylvania. As bearing upon this question, see *Dixon v. La Farge*, 1 E. D. Smith, 722; *Eccleston v. Hetting*, 17 Mont. 88. Our conclusion, therefore, is that the plaintiff, upon the facts shown in the complaint, is entitled to a

lien upon the building and premises, and that the circuit court erred in its ruling upon that question. The judgment of the circuit court is therefore reversed, and a new trial ordered.

Fuller, J., took no part in this decision.

MECHANIC'S LIENS—WHAT CLAIMS MAY BE SECURED BY. A teamster has a lien for hauling lumber used in the erection of a building under the mechanic's lien law of Pennsylvania, and it is error to strike such lien off the record: *Hill v. Newman*, 38 Pa. St. 151; 80 Am. Dec. 473, and note. See *Coenen v. Staub*, 74 Iowa, 32: 7 Am. St. Rep. 470; *Bowen v. Phinney*, 162 Mass. 598; 44 Am. St. Rep. 391.

BROWN v. EDMONDS.

[8 SOUTH DAKOTA, 271.]

EXECUTION, EXEMPTION OF WATCH AS WEARING APPAREL.—Under a statute exempting all the wearing apparel and clothing of a debtor and his family from execution, a gold watch and chain constantly carried by him are exempt.

Edwin Van Cise, for the appellant.

McLaughlin & McLaughlin, for the respondents.

²⁷² **HANEY, J.** This case is now before us on rehearing. Our former opinion will be found in *Brown v. Edmonds*, 5 S. Dak. 508. Defendant, a judgment debtor, was ordered, in proceeding supplementary to execution, to deliver to the sheriff a gold watch and chain owned by him, and which he had carried constantly for three years. In the former opinion it was held that these articles were not exempt as "household furniture." Appellant now contends that they are exempt, under section 5127 of the Compiled Laws, which makes absolutely exempt "all wearing apparel and clothing of the debtor and his family." Whether a watch carried constantly by the debtor should be regarded as wearing apparel within the intent of the statute, is the only question to be determined.

Under a law providing that the "necessary wearing apparel owned by any person, to the value of one hundred dollars," shall be exempt, if selected, the supreme court of Oregon held that a watch not exceeding seventy dollars in value should be considered as an article of "wearing apparel," and quoted with approval from the language of Hammond, J., in *In re Steele*, 2 Flap. 324, Fed. Cas. No. 13346, as follows: "It would not be doing any great violence ²⁷³ to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of mod-

erate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing. The idea of ornamentation seems to be rather a prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane": *Stewart v. McClung*, 12 Or. 431; 53 Am. Rep. 374. In *Rothschild v. Boelter*, 18 Minn. 362, it was held that a silver watch and chain, worth forty dollars or fifty dollars, worn by the debtor, is not exempt under the statute as "wearing apparel of the debtor and his family." The court say: "That an article may be worn does not make it wearing apparel within this statute. The words are to be construed in this case according to the common and approved usage of the language namely, as referring to garments or clothing generally designed for wear of the debtor and his family." It will be observed, however, that the Minnesota statute exempts "all wearing apparel of the debtor and his family"; our statute, "all wearing apparel and clothing of the debtor and his family." If the exemption was to be limited to "garments or clothing generally designated for wear of the debtor and his family," it was unnecessary to use both terms "wearing apparel" and "clothing." All authorities define "apparel" as including more than "clothing." Presumably, the legislature employed both terms advisedly, and for the purpose of including in the exemption more than would be understood by the term "clothing." The exemption is not limited in value, nor by the word "necessary," found in most statutes. Watches are as essential to the comfort and convenience of men in nearly all vocations as are hats or coats; in many they are absolute necessities. The same condition, in perhaps a less marked degree, prevailed when the statute under discussion was enacted. While the question is not free from difficulty, and one upon which courts may easily differ, we are inclined to hold that defendant's watch and chain were absolutely exempt as wearing apparel. Adhering to the views formerly announced ²⁷⁴ upon the questions then presented, it follows that the order appealed from must be reversed. The former order as to costs in this court will not be modified, appellant being allowed costs on rehearing.

All the judges concur.

EXECUTION—EXEMPTION—WEARING APPAREL.—A watch may be exempt as "wearing apparel" upon affirmative proof that the amount of exemption is not exceeded: *Stewart v. McClung*, 12 Or. 431; 53 Am. Rep. 374. Rings and jewelry are not wearing apparel and are liable to seizure: *Frazier v. Barnum*, 19 N. J. Eq. 316; 97 Am. Dec. 669. See, also, *Towns v. Pratt*, 83 N. H. 245; 66 Am. Dec. 726, and note.

FISH v. DE LARAY.

[3 SOUTH DAKOTA, 320.]

ESTATES OF DECEDENTS, CLAIMS AGAINST WHICH NEED NOT BE PRESENTED.—One having a mechanic's lien against the property of a decedent may foreclose it without first presenting a claim therefor to his administrator or executor. The word "claim," as employed in statutes respecting the estates of decedents, applies only to those demands which are sought to be enforced as a personal liability against the estate, and does not include claims which are sought to be enforced merely as liens against his property.

Frawley & Laffey, for the appellants.

320 FULLER, J. This is an action to foreclose a mechanic's lien for material furnished for the erection of a dwelling-house upon the real property of a decedent. The contract was made with the owner, and the lien was perpetuated, and made effectual for all purposes, by filing the same, as required by law, about one year prior to the death of said owner. While all necessary and proper persons, including the administrator, heirs at law, guardian, and a mortgagee, were made parties defendant, no resistance to the foreclosure proceeding was offered by any of them, and no brief is filed herein by respondents, for the sole reason that it did not appear that the claim upon which the lien was founded had been presented to the administrator for allowance or rejection, and upon full and specific findings of fact otherwise favorable to plaintiffs, the court found, as a matter of law, that plaintiffs were not entitled to the relief prayed for; and from a judgment dismissing the action, accordingly entered, plaintiffs appeal. The primary object **321** of the statutory provision requiring a claim against the estate of a deceased person to be presented within a specified time is to apprise the administrator and the court of the existence thereof, so that a proper and timely arrangement may be made for its payment in full, or a pro rata portion thereof, in the due course of administration. Like the lien of a mortgage, which survives the obligor, and is enforceable by a foreclosure and sale of the encumbered property, a debt evidenced by a verified, itemized statement of the amount due, which is secured by a mechanic's lien made of record, so that the world is charged with notice of its existence and amount, ought not to be barred and lost, so far as it affects the property subject thereto, by a failure to present the claim thus secured. Without such presentation, the administrator is presumed to know of the existence of the demand, and the specific lien for its enforcement, which takes precedence, at least,

over all subsequent encumbrances. In no respect is there an important distinction between the lien of a mortgage and that given by the statute to one who, relying upon its protection, enhances, by his labor or building material, the value of real estate, by erecting buildings thereon. "The operation of law," says Mr. Phillips, "is a convenient substitute for the giving of a mortgage or other express security, day by day, for the value of such work and materials, and is to be considered and enforced as such": Phillips on Mechanics' Liens, 494. A debt secured by mortgage upon real or personal property is not a claim which must, under section 5790 of the Compiled Laws, be presented to the administrator. The claims to be thus presented are claims which, when allowed, shall be ranked as acknowledged debts of the estate, to be paid in whole or in part, in the due course of administration: Comp. Laws, sec. 5795; Purdin v. Archer, 4 S. Dak. 54; Kelsey v. Welch, 8 S. Dak. 255. From page 213 of 5 American and English Encyclopedia of Law, we quote the following: "A creditor may rely upon a mortgage or other specific lien, although the claim secured by it has not been presented, but in such case ³²² he has no claim upon the general assets in the hands of the administrator." Mr. Justice Field, in Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140, in defining the word "claim," as used in a statute similar to ours, says: "Whatever significance there may be attached to the word 'claim,' standing by itself, it is evident that in the probate act it has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions, for the recovery of money upon which only a money judgment could have been rendered." Our conclusion is, that the facts, as found by the court, entitle appellants to the relief prayed for. The judgment of dismissal is therefore reversed, and the case is remanded, with the direction that judgment for plaintiffs be accordingly entered.

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST—NECESSITY OF PRESENTMENT—LIENS.—An allegation of presentment of a claim is unnecessary in an action to enforce specific liens and equitable rights against an estate: Fallon v. Butler, 21 Cal. 24; 81 Am. Dec. 140, and note. A claim secured by mortgage need not be presented against the estate of a deceased mortgagor, but the creditor may rely on his security: Putnam v. Russell, 17 Vt. 54; 42 Am. Dec. 478. The same is held as to a judgment in Cole v. Robertson, 6 Tex. 356; 55 Am. Dec. 784. See Brown v. Brown, 56 Conn. 249; 7 Am. St. Rep. 307.

McHARD v. WILLIAMS.

[8 SOUTH DAKOTA, 881.]

COUNTERCLAIM, WHEN ARISES OUT OF THE SAME TRANSACTION, OR IS CONNECTED WITH THE SUBJECT OF THE ACTION.—Under a statute providing that the defendant may plead any counterclaim arising out of the cause of action set forth in the plaintiff's complaint, or connected with the subject of the action, a defendant, sued to foreclose a mortgage on real property, may plead that at the time the note sued upon was given, and as part of that transaction, he executed to the plaintiff a chattel mortgage to secure the same note, that the plaintiff afterward without the consent of the defendant, altered such mortgage in a material respect, and, subsequently pretending to foreclose it, the plaintiff unlawfully took and carried away certain personal property described therein, and converted it to his own use to the damage of the defendant in a sum specified.

COUNTERCLAIM, CONSTRUCTION OF STATUTES RESPECTING.—Statutes giving defendants a right to assert counterclaims should be liberally construed.

C. G. Hartley and Pepper & Scott, for the appellant.

Hassell & Meyers, John Pusey, and S. V. Ghrist, for the respondent.

282 CORSON, P. J. This is an appeal by the plaintiff from an order overruling his demurrer to a counterclaim interposed by the defendant. The action was brought to foreclose a real estate mortgage. The defendant Williams filed an answer, in which he sets up two counterclaims. The demurrer to the first was sustained, and it will not be further noticed. The demurrer to the second was overruled. This counterclaim is as follows: "7. For a further answer and for a second counterclaim to the causes of action set forth in plaintiff's complaint, this defendant alleges that on the 9th day of July, 1887, at the time the note for \$300, described in the first paragraph of the complaint, was given, and as a part of that transaction, this defendant duly made, executed, and delivered to the plaintiff a certain written instrument, to wit, a chattel mortgage, dated on that day, and signed by this defendant, which said chattel mortgage was so given as security for the payment of the said \$300, on four mules belonging to this defendant, and the said chattel mortgage, at the time of its execution and delivery as aforesaid, provided for no attorney's fee; that thereafter, and before said chattel mortgage was filed for record in the office of the register of deeds in and for said Hand county, in which county this defendant resides, the plaintiff, by himself or agent, and with the knowledge, consent, and authority of plaintiff, and without any consent thereto by this defendant, materially al-

tered and changed the said chattel mortgage by inserting therein a provision for the payment of an attorney's fee of \$100; that after the said mortgage had been so altered, the plaintiff caused it to be filed in the office of the said register of deeds; that on or about the 10th day of May, 1892, this defendant was lawfully possessed of and was the owner of the mules described in the said chattel mortgage, of the value of \$700; that on said last-mentioned day, at said Hand county, the said plaintiff, pretending to foreclose said fraudulently altered chattel mortgage, unlawfully took and carried away said mules, and converted and disposed of the same to his own use, to the damage of this ~~888~~ defendant seven hundred (700) dollars; that this defendant knew nothing of the said fraudulent alteration in said chattel mortgage until after said plaintiff had disposed of said mules."

It will be observed that it is alleged that the giving of the chattel mortgage was a part of the same transaction set out in the complaint, the chattel mortgage being given to secure the same note that was secured by the mortgage on real estate sought to be foreclosed by this action. But appellant contends that the counterclaim is not based upon the chattel mortgage, as the pleader, in effect, shows that the chattel mortgage was void, and hence it is out of the case, and that the claim of the defendant is based upon the wrongful conversion of the mules by the plaintiff, not constituting a breach of any contract, but a tort, which cannot be counterclaimed against a cause of action on contract. Respondent, however, insists that the counterclaim was proper, under subdivision 1, section 4915 of the Compiled Laws, and that the cause of action set out in the counterclaim arose out of the transaction set forth in the plaintiff's complaint, or was connected with the subject of the action. The cause of action set out in the counterclaim, it seems to us, clearly arose out of the transaction, or was connected with the subject of the action, set forth in plaintiff's complaint. A part of that transaction, as set out in the counterclaim, was the giving of the chattel mortgage under which the plaintiff assumed to sell defendant's mules. The mere fact, therefore, that the acts of the plaintiff regarding the chattel mortgage, subsequent to its execution, are claimed to have invalidated it, and rendered plaintiff's sale of the mules illegal, and subjected the plaintiff to liability to the defendant for their full value, does not render the sale any the less a part of the transaction connected with the subject of the action: *Laney v. Ingalls*, 5 S. Dak. 183; *Ainsworth v. Bowen*, 9 Wis. 348; *Streeper v. Thompson* (Tex. Civ. App., Sept. 5, 1893), 23 S. W. Rep. 326; *Carpenter v. Manhattan*

Life Ins. Co., 93 N. Y. 552; Bliss on Code Pleading, secs. 372-377. In *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552, the court of appeals of New York uses the following ²⁸⁴ language: "The counterclaim must have such a relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation, and that the claim of the one should be offset against or applied upon the claim of the other. Here it is sufficiently accurate to say that the subject of the action was the wood wrongfully taken by the defendant, and the counterclaim was for damages sustained by the defendant, in the wrongful impairment of its security, by the severance of the same wood from the land, and thus diminishing the value of the land by the value of the wood. In such case it is certainly just that the defendant should counterclaim its damages for the severance of the wood against the plaintiff's claim for the conversion thereof. In the forum of conscience, the plaintiff was under obligation to restore the wood to the defendant as a portion of its security for its claim against the mortgagor. Thus it can with great propriety be said that defendant's claim had some connection with the subject of the action." If the note set out in plaintiff's complaint, and to satisfy which he seeks to sell defendant's real property, was in effect satisfied by a sale of defendant's personal property, mortgaged to secure the same note, it would be manifestly unjust to compel the defendant to submit to a judgment upon the note, and a sale of his real property to satisfy the same, and leave him with simply a right of action against the plaintiff for the value of his mules.

One of the more important purposes of the adoption of the code system of pleading was to avoid as far as possible a multiplicity of suits, and to enable parties to determine their differences in one action. And to this end counterclaims were designed, not only to include recoupment and setoffs at common law, but to enlarge their scope, so that but few cases could arise in which all litigation between the parties to the action might not be settled in the same suit. The learned counsel for ²⁸⁵ the appellant has argued the case upon the theory that the provisions relating to counterclaims should be strictly construed, but in this he is clearly in error. These provisions should receive a liberal construction, as, in the language of Mr. Justice Fuller, in *Laney v. Ingalls*, 5 S. Dak. 183, it "enables litigants to determine their controversies without additional expense, and, in case

a plaintiff is insolvent, it is often the only means by which a defendant may obtain justice."

The order of the circuit court overruling the demurrer is affirmed, and the case remanded for further proceedings according to law.

COUNTERCLAIM—STATUTES ALLOWING—CONSTRUCTION. Statutes allowing counterclaims must, as remedial statutes, be liberally construed with a view to effect the object for which they were passed, that is, to prevent a multiplicity of actions, and enable, as far as possible, the settlement of cross-claims between the same parties in the same action: Monographic note to *Woodruff v. Garner*, 89 Am. Dec. 484.

COUNTERCLAIM—GENERAL NATURE.—Where a contract is the basis of a transaction and a breach of it may amount to a trespass, or entitle the injured party to an action for negligence, fraud, or otherwise, in form *ex delicto*, such party is not deprived of his right to plead a counterclaim as a setoff against the action. The wrongdoer is not allowed to deprive the injured party of the advantage of the contract by having tortiously violated it: *Folsom v. Carril*, 6 Minn. 420; 80 Am. Dec. 456. See the monographic note to *Woodruff v. Garner*, 89 Am. Dec. 482-492.

HURON v. BANK OF VOLGA.

[8 SOUTH DAKOTA, 449.]

PUBLIC NUISANCE, AUTHORITY OF MUNICIPAL CORPORATION TO RESTRAIN BY SUIT.—If a building situate in a populous part of a city is so injured by fire as to endanger the property and lives of the inhabitants of the city, it may maintain a suit in equity to compel the owner to tear down and remove such building. Its remedy is not limited to indictment or abatement.

INJUNCTION AGAINST PUBLIC NUISANCE.—A court of equity has jurisdiction to restrain an existing or threatened public nuisance at the suit of the state or the people of a municipality, or some public officer representing the state or the municipality.

T. H. Nall, for the appellant.

A. W. Wilmarth, for the respondent.

450 FULLER, J. The complaint in this action by a municipal corporation against a private corporation to abate a public nuisance alleges, and the specific findings of fact by the court conclusively show, that the Wright House, a large, three-story, wooden structure, owned by the defendant, and situated conspicuously upon a business street in the most densely populated portion of the city of Huron, was badly damaged and partially destroyed by a fire which occurred during the month of March, 1891, and that by reason thereof conditions arose and still exist

in and about said structure which endanger the property and lives of the inhabitants of said city. As the existence of a public nuisance extremely dangerous and unusually repulsive in character, may well be conceded from the undisputed evidence, further facts will not be recited. By the decree of the court defendant was directed to tear down and remove its ruined and dilapidated building, and upon failure so to do within thirty days the plaintiff was authorized to tear down and remove and abate the same. The defendant in the court below, and now upon appeal from the judgment, relies wholly upon the proposition that the corporate authority was without power to maintain the action. Unless a public nuisance is specially injurious to the private person, the statute authorizing a civil remedy therefor precludes him from maintaining an action, and counsel for appellant maintain that respondent's exclusive statutory remedy is by indictment or abatement: Comp. Laws, secs. 4688, 4690. Respondent's charter provides that "the city council shall have power to restrain, prohibit, and suppress nuisances at common law," and a proper regard for the peace and tranquility of society, as well as the interests of the members thereof, suggests the advantages resulting in a doubtful case from the right of a municipal corporation to obtain a judicial determination of the existence of a public nuisance before proceeding to demolish and destroy a building lawfully erected, which, without fault of the owner, appears to have become menacing and harmful to the inhabitants of a city. In discussing the question Judge ⁴⁵¹ Dillon says: "As there is in such cases a judicial remedy in favor of the citizen, so, on principle, the right of the corporate authorities to resort at their election to the courts in proper cases to aid them when the citizen is in the wrong, should, in the author's judgment, be also recognized": 1 Dillon on Municipal Corporations, 4th ed., sec. 379. Judge Woods observes, in his treatise on the Law of Nuisances, that: "Except in cases of great emergency, when the emergency may safely be regarded as so strong as to justify extraordinary measures upon the ground of paramount necessity, or when the use of property complained of is so clearly a nuisance as to leave no room for doubt upon the subject, it is the better course to secure an adjudication from the courts, before proceeding to abate it": Wood on Nuisances, 2d ed., sec. 744. "A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general, in England, and at the suit of the state, or the people or the municipality, or some proper officer representing the commonwealth, in this country": 3 Pome-

roys' Equity Jurisprudence, 380. In the following cases it was expressly held that a civil action by the proper officers of a city would lie to abate a public nuisance: *Denver v. Mullen*, 7 Colo. 345; *Pine City v. Munch*, 42 Minn. 342; *New Orleans v. Lambert*, 14 La. Ann. 244; *Waterloo v. Union Mill Co.*, 72 Iowa, 437. See, also, 15 Am. & Eng. Ency. of Law, 1184. While a private person is not authorized to maintain the action, unless specially injured, a city council, being the governmental agency to whom the inhabitants of a municipality have the right to look in a proper case for protection from the evil effects of a public nuisance, may, when authorized so to do, resort to an indictment, a civil action, or abatement, according to the exigencies of the particular case. In our opinion, section 4688 of the Compiled Laws, when considered with respondent's city charter, reasonably construed, authorizes the corporate authorities to apply, in cases like the present, to a court of equity for aid in the enforcement ⁴⁵² of its granted power "to restrain, prohibit, and suppress nuisances at common law."

The judgment appealed from is affirmed.

INJUNCTION AT INSTANCE OF MUNICIPAL CORPORATION. A city in its corporate capacity may maintain a suit in equity to obtain an injunction to prevent threatened obstructions or serious unlawful injuries to public streets: *Bau Claire v. Matzke*, 86 Wis. 291; 89 Am. St. Rep. 800, and note.

BRADY v. KREUGER.

[8 SOUTH DAKOTA, 464.]

EJECTMENT, PLEADING.—A complaint alleging that the plaintiff at a date named was the owner and seised and possessed of certain premises, and that the defendant has unlawfully entered on the second story thereof and ousted and ejected plaintiff therefrom, and has ever since withheld the possession thereof from him, is sufficient as a complaint in ejectment, and does not disclose a cause of action in forcible entry and detainer.

PRACTICE ON APPEAL.—A motion to direct a verdict presents a question of law which may be reviewed upon appeal though the bill of exceptions does not contain any specification of the particulars in which the evidence is alleged to be insufficient to support the verdict.

HOMESTEAD IN PARTNERSHIP PROPERTY.—The wife of a partner is not entitled, as against another partner, to a homestead in its real property under a statute declaring that each member of a partnership may require its property to be applied to the discharge of its debts, and is a lien upon the shares of the other partners for this purpose and for the payment of any general balance due to him.

THE REAL ESTATE OF A PARTNERSHIP is subject to the same rules as its personal property.

HOMESTEAD—DIVORCE.—A wife, upon being divorced from her husband, ceases to have any right to the occupancy of the homestead property, unless such right is given to her in the decree of divorce.

PRACTICE ON APPEAL.—Courts will not indulge in presumptions for the purpose of reversing a judgment.

DIVORCE, EFFECT OF UPON WIFE'S PROPERTY RIGHTS.—When the relation of husband and wife is terminated by divorce, she ceases to have any claim upon, or right in, his property whether homestead or otherwise, unless such right is preserved to her by the decree of divorce. Whenever thereafter she seeks to assert any claim of any character in any part of the husband's property, she must establish her right by such decree or by valid contract between herself and him.

A COTENANT MAY RECOVER, IN AN ACTION OF EJECTMENT, the whole of the property of the cotenancy as against one in possession thereof without title.

H. J. Kreuger, C. H. Barron, and Albert Gunderson, for the appellants.

John H. Perry and Horner & Stewart, for the respondent.

465 CORSON, P. J. This was an action to recover the possession of real property, and damages for its detention. The action was originally commenced against Kreuger alone, but subsequently Minnie Nidrow (formerly Minnie Kipp) was made a party defendant by an amendment to the answer. Kreuger, in **466** his answer, denies the ownership of the plaintiff, and alleges, in substance, that Minnie Kipp was at all times mentioned in the complaint in the lawful and peaceable possession of the second story of the building on said premises, by virtue of a homestead right thereto as the wife of John Kipp, and that defendant was in the possession of the same as her agent. The facts, as disclosed by the evidence, briefly stated, are as follows: John H. Kipp and Samuel O. Overby, prior to April 11, 1893, were partners in a general retail mercantile business, under the firm name of Kipp & Overby. The second story of the building in which this mercantile business was carried on was occupied by Kipp and family and said Overby as a residence. On the last-mentioned day, Overby conveyed his interest in the real and personal property of the partnership to plaintiff, Brady, and the business was continued under the firm name of Kipp & Brady until November, 1893, when Brady purchased Kipp's interest in the partnership. The lots and building thereon used as the store and dwelling-house were partnership property. At the time Kipp sold his interest to Brady, Kipp and his family still occupied the said second story of the store building, but

the deed to the real property was not signed by Mrs. Kipp. In December, 1893, a decree of divorce was granted dissolving the marriage between Mr. and Mrs. Kipp; but she continued to occupy the second story of the store until March, 1894, when she, desiring to visit friends in the east, requested Kreuger to occupy the rooms for her in her absence, and he was so occupying them when this action was commenced. At the close of all the evidence the court, on motion of plaintiff, directed a verdict in his favor, and from the judgment entered therein the defendants appeal.

At the commencement of the trial, counsel for the defendants objected to any evidence being given under the complaint upon the grounds: 1. That the court had no jurisdiction; 2. Because the complaint did not state facts sufficient to constitute a cause of action. This objection was overruled, and the defendants ⁴⁸⁷ duly excepted. This ruling was clearly correct, as the action is one to recover the possession of real property, and damages for withholding the same, and contains all the averments essential to a good complaint in such an action. The plaintiff alleges that on November 9, 1893, he was the owner, and was seised in fee, of the premises, describing them fully; that on March 1, 1894, and while the plaintiff was such owner and seised and possessed of the said premises, the defendants unlawfully entered upon the second story of said premises, and ousted and ejected the plaintiff therefrom, and ever since have withheld the possession of the same from the plaintiff, to his damage in the sum of two hundred dollars. It alleges that the value of the rents and profits of said premises so unlawfully withheld from March 1, 1894, is two hundred dollars, and plaintiff demands judgment for the possession, and two hundred dollars damages. The appellants contend that the action was one in forcible entry and detainer, of which the circuit court has not original jurisdiction, but only appellate jurisdiction. But in this contention the counsel are clearly in error. The complaint is sufficient as a complaint for the recovery of the possession of real property, but fails to allege several essential facts necessary to constitute an action for forcible entry and detainer: *Payne v. Treadwell*, 16 Cal. 246; Comp. Laws, sec. 6073.

At the close of the evidence on the part of the plaintiff, the defendants moved the court to direct a verdict for the defendants. This was denied, and exception taken; but as the defendants proceeded to introduce evidence on the part of the defense, and subsequently moved for a direction of a verdict at

the close of all the evidence, this exception will not be further considered.

At the close of all the evidence the plaintiff and defendants moved for a direction of the verdict. The motion of the plaintiff will be considered first in order, as its disposition will determine the motion of the defendants. The counsel for the respondent raises a preliminary question, and that is that this ⁴⁰⁸ court cannot review the evidence, for the reason that the bill of exceptions does not contain any specification of the particulars in which the evidence is alleged to be insufficient to support the verdict. The respondent has filed an additional abstract, in which he asserts that the bill of exceptions contains no statement of the particulars in which the evidence is alleged to be insufficient, and as this is not denied by the appellants, it will be taken to be true. But the counsel is clearly in error in his contention. The statement or bill of exceptions is only required to specify the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision when one of the grounds of a motion for a new trial is the insufficiency of the evidence to justify the verdict or decision: Comp. Laws, sec. 5090. A motion to direct a verdict presents a question of law, which requires the court to review the evidence in order to determine whether or not, as matter of law, the verdict was properly directed or the motion denied.

It is contended by the appellants: 1. That the husband and wife have a homestead interest in partnership real property, and that no conveyance of such homestead can be made by the husband alone; 2. That after a divorce the wife retains her interest in the homestead, and that, under the facts proven in this case, she was entitled to retain possession of the premises occupied by herself and husband at the time the divorce was granted; 3. That the conveyance made by Kipp of his half interest in the partnership property was absolutely void. All of these propositions are controverted by the respondent.

The real property in controversy being partnership property, no homestead rights therein could be acquired by Mr. and Mrs. Kipp, as against the copartner. Section 4034 of the Compiled Laws provides that "each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose and for the payment of the general balance, if any, due to him." ⁴⁰⁹ Real estate belonging to a copartnership is subject to the same rules as the personal property of such copartnership: Betts

v. Letcher, 1 S. Dak. 197. In the case at bar, the plaintiff, as part of the consideration for the sale to him by Kipp of his interest in the copartnership property, agreed to pay the partnership debts and save Kipp harmless therefrom. To hold that a partner, by obtaining possession of and using as a residence, partnership real estate, could acquire a homestead right therein, as against his copartner, would lead to great injustice and wrong by one partner to his copartner. We think both the spirit and policy of the law are clearly against such a claim. If Kipp could not have claimed this property as homestead property, as against the plaintiff, his wife would occupy no better position than her husband.

There is, however, another—and perhaps more satisfactory—ground upon which the ruling of the court can be sustained, and that is that the defendant Minnie Nidrow (formerly Minnie Kipp), having been divorced from her husband in the fall of 1893, ceased to have any right to the occupancy of the homestead property (admitting that there could have been such a right in copartnership property) after she ceased to be the wife of Kipp, who had the legal title to the property at the time he transferred the same to the plaintiff. The only evidence of the divorce was the admission of Minnie Nidrow when on the witness stand as a witness. She stated that in December, 1893, there were divorce proceedings between her and her husband, and that a divorce was granted, and that her name was then Minnie Nidrow, but was formerly Minnie Kipp. This evidence was admitted without objection, and *prima facie* established the divorce; and as her evidence was not controverted or disputed, we must assume that a divorce was properly granted. Appellants contend that this court will presume, in the absence of evidence to the contrary, that the decree gave her the right to retain possession of the homestead. But this we cannot do. Courts will sometimes indulge in presumptions ⁴⁷⁰ to support a judgment of a court, but never to reverse it. In the absence, therefore, of any proof as to the contents of the decree of divorce we cannot presume it contained anything favorable to the defendants. The relation of husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court. If the decree of the court preserved her rights to the homestead, or conferred upon her any other privileges in, or interests in or to, the property of the husband, the burden was upon her to establish such rights by the decree, as she clearly would have no right to the posses-

sion of the homestead after a decree of divorce had been granted, unless saved by the decree. There being in this state no right of dower, or other absolute claim of the wife upon the property of the husband, except under the law of succession, as his widow, or under a homestead claim which exists in favor of a wife or widow, and which depends solely upon the fact that she is such wife or widow, she can only avail herself of these claims by showing that she occupies either one or the other of these relations named to the husband. As the wife, upon a dissolution of the marriage, ceases to be the wife, and can never be the widow, of her divorced husband, her claims upon his property, necessarily, also cease and terminate upon the divorce: *Rosholt v. Mehus*, 3 N. Dak. 513. It was undoubtedly for these reasons that the legislature of this state has conferred upon the courts in which a decree of divorce may be obtained such comprehensive powers for regulating and settling the rights of the wife in the property of the husband: *Comps. Laws*, secs. 2581-2585. The rights of the wife, therefore, in her husband's estate after a divorce is granted, are regulated and determined exclusively by the provisions of the decree of divorce, unless there is some valid contract between the husband and wife. When a wife, after the divorce, seeks to assert any claim to any part of the husband's property ⁴⁷¹—homestead or otherwise—she must establish that right by the decree, or by a valid contract between herself and husband. In the case at bar the defendants failed to show any such right. Neither Mrs. Kipp nor Kreuger presented any valid defense to plaintiff's claim for the possession of the property, and hence the plaintiff was entitled to a verdict as matter of law.

Appellants further contend that as the deed from Kipp to Brady was executed prior to the granting of the divorce, it was void, and plaintiff was not entitled to recover the possession of the premises from the defendants, as a plaintiff must recover, if at all, upon the strength of his own title. A conveyance of the homestead, not executed by both husband and wife, the statute declares, "shall be of no validity": *Comp. Laws*, sec. 2451, amended by *Laws* 1891, cs. 76, 77. Whether such a deed is absolutely void for all purposes, or only invalid as against the party having a homestead right, it is not necessary now to determine, as the plaintiff was the owner of an undivided one-half interest in the property by reason of his purchase from Overby, and was therefore at least a tenant in common with Kipp; and, as against one without title he could recover the possession of the whole property, as such tenant in common. Granting, therefore, that

the deed from Kipp to him was void, the direction of a verdict was proper, as against parties showing no right to the possession of the property: *Collier v. Corbett*, 15 Cal. 183; *Treat v. Reilly*, 35 Cal. 129.

Finding no error in the record, the judgment of the circuit court is affirmed.

EJECTMENT BY COTENANT AGAINST STRANGER TO TITLE.—Each cotenant, irrespective of the character of the cotenancy, is, as against all strangers thereto, entitled to the exclusive possession of all the property thereof. Hence, we should draw the inference that his remedies ought to correspond to his rights, and that whenever a stranger to the title unlawfully seized or held possession of the property, either cotenant might recover such possession and procure a writ absolutely excluding the intruder from the possession of the property: Monographic note to *Marshall v. Palmer*, 50 Am. St. Rep. 842.

PARTNERSHIP—REAL ESTATE—HOMESTEAD IN.—One partner cannot, either as against the creditors of the firm or as against his copartners, acquire a homestead right in real estate belonging to the firm: Extended note to *McCoy v. Brennan*, 1 Am. St. Rep. 595.

MARRIAGE AND DIVORCE—EFFECT OF DIVORCE ON PROPERTY RIGHTS OF PARTIES.—A final decree of divorce settles all property rights of the parties: *Roe v. Roe*, 52 Kan. 724; 39 Am. St. Rep. 367. See *Kirkwood v. Domnan*, 80 Tex. 645; 26 Am. St. Rep. 770, and note. A wife divorced for the fault of herself or of her husband has no right to administer on his estate nor to share in it: *Matter of Ensign*, 103 N. Y. 284; 57 Am. Rep. 717. See monographic note to *Alt v. Banholzer*, 12 Am. St. Rep. 686.

APPEAL—REVIEW OF ORDER DIRECTING VERDICT.—If the court at the close of the testimony, erroneously directs a verdict, the order may, if properly excepted to, be reviewed on appeal without a motion for a new trial, as the error is one of law occurring on the trial: *Jones Lumber etc. Co. v. Farris*, 6 S. Dak. 112; 55 Am. St. Rep. 814.

PARTNERSHIP REAL ESTATE is, in equity and for partnership purposes, to be treated as personalty: *Rovelsky v. Brown*, 92 Ala. 522; 25 Am. St. Rep. 83, and note; *Murrell v. Mandelbaum*, 85 Tex. 22; 34 Am. St. Rep. 777, and note.

ROBERTS v. MINNEAPOLIS THRESHING MACHINE Co.

[8 SOUTH DAKOTA, 579.]

EVIDENCE, ORAL TO ADD TO WRITTEN CONTRACT.—If by a written agreement, an agent is given the right to sell property of his principal within a designated territory, parol evidence is not admissible to show that such right is exclusive.

PRINCIPAL AND AGENT, DAMAGES RECOVERABLE BY AGENT FOR BREACH OF AGREEMENT CONFERRING ON HIM EXCLUSIVE AUTHORITY.—If an agreement is made whereby a principal agrees to give his agent exclusive authority to make sales for him within a designated territory, and to pay him as commissions twenty per cent of the purchase price of the property sold,

and the principal, disregarding the agreement, makes sales within such territory, the agent, as damages for such breach of agreement, cannot recover twenty per cent of the amount of such sales. His true measure of damages is an amount which will compensate him for the approximate detriment sustained by the breach of the contract, and, in the absence of evidence tending to show that otherwise he would have made the sale himself or that he performed any act with reference thereto, he is entitled to no more than nominal damages.

AGENTS' DECLARATIONS, WHEN NOT ADMISSIBLE IN EVIDENCE.—Statements made by the secretary of a corporation to the effect that one of its agents was entitled to certain moneys, and that, in any event, he would see that one-half thereof was turned over to such agent, are not admissible in evidence, unless shown to have been within the scope of his authority.

C. P. Bates and D. E. Powers, for the appellant.

Joe Kirby, for the respondent.

⁵⁸¹ **FULLER, J.** Plaintiff, a dealer in agricultural implements, brings this action against the defendant, a manufacturer of threshing machinery, to recover certain commissions on sales made by other persons, as damages for an alleged violation of a contract whereby it is claimed that plaintiff became the sole agent, with exclusive authority to sell said machinery within the territory mentioned in the complaint. At the conclusion of plaintiff's evidence, the court directed a verdict for the defendant, and this appeal is by the plaintiff, from an order overruling a motion for a new trial.

By the terms of the written agreement, appellant was constituted a soliciting agent of respondent for the purpose of obtaining purchasers and making sales of threshing separators, ⁵⁸² engines, attachments and repairs, subject to respondent's approval, "in the immediate vicinity of Sioux Falls, also Minnehaha county, excepting the trade tributary to Jasper, Minnesota." Respondent expressly reserved the right to sell to any party applying to the company at its home office in Minneapolis. As the only recital of the contract relating to the territory within which appellant should operate is contained in the foregoing quotation, the trial court declined to construe said instrument as exclusive in its character, and denied appellant's request to have the question submitted to a jury. One of the purported sales complained of was made by the company, at its office in Minneapolis, under the following circumstances: Appellant and respondent entered into an agreement in writing by which Parker & Nelson, of Hartford, Minnehaha county, were authorized to procure purchasers and make sales of threshing machines under the direction of appellant, but subject to the approval of

respondent, and it was agreed by and between all the parties that said Parker & Nelson should receive from respondent, upon all machinery sold and paid for, a commission of fifteen per cent. Subsequently, and during the life of appellant's contract, and at the request of Parker & Nelson, who called at the office of respondent, in the city of Minneapolis, a fully equipped threshing machine was shipped to them, at Hartford, as a sample to be exhibited to prospective purchasers. Parker & Nelson did no business in the way of finding purchasers or making sales of machinery in Minnehaha county, but, some months after receiving the sample outfit, they took the same without the knowledge or consent of respondent, and engaged in the threshing business. Later, and after the threshing season was over, and respondent had learned what had been done with its machine, a settlement was effected with Parker & Nelson in the city of Minneapolis, by which a small amount was allowed as commission on machinery sold by Parker & Nelson in Miner county, and their note for eighteen hundred dollars was executed and delivered to respondent, no part of which has been paid. As all the business was ⁵⁸⁸ transacted directly with respondent, in the city of Minneapolis, and appellant did nothing with reference thereto, it is unnecessary to determine whether the final adjustment constituted a sale by respondent to Parker & Nelson, or a settlement for property wrongfully converted. In either event there is nothing in the transaction, viewed in the light of the written contract between appellant and respondent, by which the latter would in any manner become liable to the former. To advertise, exhibit machinery, and solicit purchasers thereof, subject to respondent's approval, are a few of the numerous requirements imposed by the contract upon appellant, in order to entitle him to twenty per cent of the purchase price when the same is paid in cash at the time of sale, or when realized from the collection of deferred payments; and the theory upon which appellant seeks to recover twenty per cent of the price for which the above-mentioned machinery was sold is that his agency for Minnehaha county was, with the exceptions specified in the contract, exclusive and entitled him to twenty per cent upon all sales by whosoever made, therein. From a careful examination of that instrument, we are of the opinion that the trial court correctly concluded that there is nothing contained in the recitals of the contract which justifies such a recovery.

At the trial, after propounding several questions to appellant, to which objections were interposed and sustained, his

counsel made the following offer upon the record, which was refused by the court: We offer to show by this witness that at the time of entering into the contract he had a conversation with Mr. Neel, the agent of the company, who came here to make the contract, and who signed it for the company, in which Mr. Neel said that the contract provided for the exclusive agency for the sale of the threshing machinery specified therein, in Minnehaha county, excepting trade tributary to Jasper, and that Mr. Roberts should receive from the company a commission of twenty per cent on the sale of all goods, excepting extras and repairs, made in this territory, no matter by whom made; ⁵⁸⁴ that this conversation took place at the time the written contract was made." Assuming, without deciding, that oral evidence of a contemporaneous parol stipulation was competent to show that it was the intention of the parties to give appellant the exclusive right to solicit sales in that portion of Minnehaha county not tributary to the village of Jasper, it by no means follows that appellant can, by parol, inject into said contract an inconsistent agreement upon the part of respondent, by which it is bound to pay appellant twenty per cent upon sales made by itself, in strict compliance with the contract, or by its Jasper agents, in territory tributary to that village. Such testimony would flagrantly violate the familiar rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument": *Osborne v. Stringham*, 1 S. Dak. 406. As a precautionary means by which to avoid any misunderstanding, respondent, at the time of making the contract with appellant, required him to assent to the following express provision: "Our contracts are intended to specify the exact agreement with agents, and we will not be responsible for any statement, promises, or representations claimed to have been made to them, outside of this contract, unless the same is in writing from us or our contracting agent."

If appellant's right to sell in certain territory is exclusive, there is certainly nothing in the contract by which the amount of damages, in case of a breach thereof, is anticipated, and fixed at twenty per cent of the purchase price of machinery, by whomsoever sold, and the true measure of damages is an amount which will compensate appellant for the proximate detriment sustained thereby: *Comp. Laws*, sec. 4581. Without anything before the jury as a basis for the computation of compensatory damages, and in the entire absence of evidence tending to show that in any event appellant would have made either of the sales

complained of, or that he performed any act with reference thereto, mere proof of the violation of the contract ⁵⁸⁵ would entitle appellant to no more than nominal damages, to allow a recovery of which appellate tribunals will not reverse a trial court, unless it be essential to the determination of some legal right clearly invaded or involved: *Olson v. Huntimer*, 8 S. Dak. 220; 2 Ency. of Pleading and Practice, 535; *Benson v. Waukesha*, 74 Wis. 31; *Delta Lumber Co. v. Williams*, 73 Mich. 86; *McAllister v. Clement*, 75 Cal. 182; *McCauley v. McKeig*, 8 Mont. 389; *Williams v. Brown*, 76 Iowa, 643. On principle, there is no material distinction between this case and *Waterman v. Boltinghouse*, 82 Cal. 659, where the supreme court of California hold that "a real estate broker, who has a contract giving him the exclusive right to sell land within a certain time, cannot recover his commissions of his employer, who sells, himself, within the time, without the agency of the broker, unless he has produced a purchaser ready and willing to buy according to the terms of the contract." To the point that the actual detriment occasioned must be shown by competent evidence, and with reasonable certainty, in order to entitle appellant to anything more than nominal damages, see *American etc. Assn. v. Hart*, 2 Wash. 594. To the same effect see *Howe Machine Co. v. Bryson*, 44 Iowa, 159; 24 Am. Rep. 735; *Houston etc. Ry. Co. v. Hill*, 63 Tex. 381; 51 Am. Rep. 642. The evidence of statements made by respondent's secretary, to the effect that he was satisfied that the sales made by the Jasper agents to parties, some of whom resided in Minnehaha county, belonged to appellant; that he had written said agents, requesting them to turn over said commission; and that, in any event, he would see that one-half of said commission was turned over to appellant, was in the nature of a compromise, and clearly incompetent, because not shown to be within the scope of his authority: *Plymouth Co. Bank v. Gilman*, 4 S. Dak. 265; 46 Am. St. Rep. 786. As the record contains no error of which the appellant can rightfully complain, the order appealed from is affirmed.

EVIDENCE—PAROL, TO VARY WRITTEN CONTRACT.—It is well understood that parol evidence is not admissible to vary or contradict a written instrument, whatever may be its form: Monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659.

DAMAGES FOR BREACH OF CONTRACT.—One injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, if they are certain, and such as might naturally be expected to follow the breach: *State v. Andrews*, 30 W. Va. 35; 45 Am. St. Rep. 884, and note. See, also,

Wakeman v. Wheeler etc. Mfg. Co., 101 N. Y. 205. 54 Am. Rep. 676, where the contract sued upon was like that in the principal case.

CORPORATIONS—DECLARATIONS OF AGENTS.—Declarations of the officers of a corporation bind it only when made in the course of the performance of their authorized duties, so that such declarations constitute part of the *res gestae*: **Browning v. Hinkle**, 48 Minn. 544; 81 Am. St. Rep. 691, and note; **Agricultural Ins. Co. v. Potts**, 55 N. J. L. 158; 39 Am. St. Rep. 637, and note.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

SHAPLEIGH HARDWARE COMPANY v. WELLS.

[90 TEXAS, 110.]

SURETY, PRINCIPAL DEBTORS CANNOT CHANGE ONE OF THEIR NUMBER INTO.—One of two or more principal debtors cannot, by agreement among themselves, without the consent of their creditor, be changed in character from a principal to a surety, so that he will be released by those acts or omissions which release a surety.

PARTNERSHIP, EFFECT OF THE RETIRING OF ONE MEMBER WITH AN AGREEMENT THAT THE OTHERS WILL ASSUME THE LIABILITIES.—An agreement between partners that one of them shall retire from the firm, and that those remaining will assume and discharge the firm liabilities, unless consented to by its creditors, does not release the retiring partner from liability, nor change his liability into that of a surety.

F. E. Dycus, for the appellant.

Marberry & Taylor, for the appellee.

111 BROWN, A. J. The court of civil appeals for the second supreme judicial district has certified to this court the following statement and question:

“Appellant sued appellees upon a debt for merchandise contracted by them while engaged in a mercantile business under the firm name of Wells & Chestnut. While so indebted the firm was dissolved by mutual consent, Chestnut purchasing the interest of Wells and assuming the liabilities of the concern. Thereupon Wells notified appellant of this fact, and requested that he be released, and, upon this being refused, requested, as claimed by him, that suit be brought against Chestnut as pro-

vided in articles 3660 and 3661 of Sayles' Statutes, but this was not done.

"The material question in the case, which we deem it proper to certify to your honors for decision, is this: Can one of two or more principal debtors, by agreement among themselves without the consent of the creditor, so change the character of his liability to such creditor from principal to surety as to make available to him the provisions of the articles above referred to? Or, in other words, did Wells, after notice to Shapleigh Hardware Company of the arrangement whereby Chestnut was to pay the debt, occupy the relation of surety thereon, so as to entitle him to the remedy and rights provided in the foregoing articles?"

There is some conflict of authority upon the question presented for our ¹¹² consideration. We think that the weight of authority and sound reasoning support the proposition that one of two or more principal debtors cannot, by agreement with his codebtor or debtors, without consent of the creditor, so change the character of his liability from principal to surety as to entitle him from the creditor to the treatment and protection of a surety for the debt. In support of this position we cite the following authorities: Parsons on Partnership, 3d ed., 428; 1 Lindley on Partnership, 245; 1 Bates on Partnership, sec. 533, et seq; Story on Partnership, sec. 158; White v. Boone, 71 Tex. 712; Shepherd v. May, 115 U. S. 505; Whittier v. Gould, 8 Watts, 485; Rawson v. Taylor, 30 Ohio St. 389; 27 Am. Rep. 464; Wadhams v. Page, 1 Wash. 420; Skinner v. Hitt, 32 Mo. App. 409; Barnes v. Boyers, 34 W. Va. 304; Swire v. Redman, L. R. 1 Q. B. Div. 536; Hall v. Jones, 56 Ala. 493.

As supporting the contrary doctrine we cite the following: Brandt on Suretyship and Guaranty, sec. 36; Colgrove v. Tallman, 67 N. Y. 95; 23 Am. Rep. 90; Smith v. Sheldon, 35 Mich. 49; 24 Am. Rep. 529; Campbell v. Floyd, 153 Pa. St. 84; Williams v. Boyd, 75 Ind. 286; Gates v. Hughes, 44 Wis. 332.

In the case of White v. Boone, 71 Tex. 712, cited above, which involved very much the same state of facts as in the case submitted, Judge Collard said: "A retiring partner is not discharged from existing liabilities of the copartnership nor for any unexpired lease made before retirement. The fact that the remaining partners have agreed with him to pay the debts and exonerate him from all liabilities upon a lease or other executory contract would not affect the rights of the lessor. Such an agreement would be binding between the partners them-

elves only, unless creditors became parties to the agreement for consideration."

The opinion in that case, which was approved by the supreme court, covers every material point involved in the question certified, and in our judgment established the precedent in our state in accordance with the weight of authority.

If it were necessary to adduce reasons in support of the position taken upon this question, we could do no better than to quote from the opinion delivered by Judge Stone in the case of *Hall v. Jones*, 56 Ala. 493, the following language: "When the goods were consigned by Hall & Long to Hannon, Brown & Jones, and received by them as commission merchants, this constituted a contract binding on each of the partners composing the latter firm to account for the goods or their proceeds. Such liability could not be canceled by any act of the latter firm alone or by any agreement its different members might make among themselves in which Hall & Long did not concur. It requires the same mutuality to vary or modify a contract as it does to create it in the first instance. The modification is only a species of contract." This doctrine that a contract when once made cannot be unmade without consent of both parties thereto, is so evidently sound, just, and correct, that no argument is required to sustain it.

The leading cases in America which support the opposite view of this ¹¹³ question are *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90, and *Smith v. Sheldon*, 35 Mich. 49, 24 Am. Rep. 529, both hereinbefore cited. Both of these cases rest upon the authority of *Oakely v. Pasheller*, 4 Clark & F. 207. In the former case Judge Folger, of the supreme court of New York, after stating the proposition that an agreement between two partners upon dissolution that one should pay all the debts of the firm constituted the retiring partner surety of the other as between themselves, continues in this language: "When it was made known to Colgrove by Tallman that Barnes & Tallman had gone into the bargain which was thus made between them, Colgrove became bound to Tallman in equity to observe it." Thus he assumes the only proposition in controversy in the case—that is, that the agreement of the partners made between themselves, without consent of the creditor, imposed upon the latter the obligation to protect the rights of Colgrove as a surety for his codebtor. In support of this assumption he cites the case of *Oakely v. Pasheller*, 4 Clark & F. 207.

In the case of *Smith v. Sheldon*, 35 Mich. 49, 24 Am. Rep. 529, Chief Justice Cooley undertakes to reason to the conclu-

sion that such agreement would have the effect to change the contract without the consent of the creditor. He first lays down the correct rule, that as between themselves the retiring partner became a surety for the other partner. Also another proposition to the effect that if a contract be made by two or more persons as joint obligors therein, but it does not appear from the face of the writing that one of them is surety for the others, and if it be not known to the obligee in the contract that such is the case, then all the obligors will be regarded as principals in so far as it affects the obligee until the fact of suretyship is made known to him, after which he must observe the rights of the surety in his dealings with the principal in the contract. The learned judge then proceeds to reason that because, under such circumstances, the fact of suretyship being made known to the creditor imposed upon him the obligation to treat the surety as such from the time the information is received, it follows that the principal obligors in a contract may, by agreement between themselves, change the obligation of one or more from that of principal debtor to that of surety, and upon notice of such agreement to the obligee the same effect will be given as if the suretyship originated in the contract itself. This is evidently unsound reasoning. In the first case stated, the contract was made by the party as a surety, but he was deprived of the protection given to a surety by the law, because the payee was an innocent holder of it for value without notice of his rights as surety, and, upon notice being given, the character of the creditor as innocent holder ceased; and the terms of the contract became operative and in full effect as to all the parties; while in the case decided by Judge Cooley he gave to the action of the parties this effect, that the original contract was in the first instance on the part of all the debtors made as principals and so accepted by the creditor, but subsequently, by an agreement between the debtors themselves, without consent being given on the part of the creditor, the contract was changed and a new one made between¹¹⁴ the debtors, by which the creditor is charged with the duty of taking care of the interests of one of the principal debtors as surety. In the former case, the effect of notice to the creditor does not change the contract, but removes the legal impediment to enforcing its terms; in the latter, notice to the creditor is given the effect of changing the terms of his contract without his consent and over his protests. The doctrine asserted as to the rights of the surety, who contracted as such, after the suretyship was made known to the holder of the contract, is equitable in itself and consistent with sound legal principles; but

the conclusion drawn therefrom, that one who contracts as a joint principal with others may, by agreement with his codebtors and without consent of the payee in the contract, change his relation to the creditor so as to impose new obligations upon him, is neither just nor sound as a matter of law. It is inconsistent with the fundamental and accepted principles which govern the subject of contracts, which require the agreement of the parties to make or change them. The doctrine announced in *Smith v. Sheldon*, 35 Mich. 49, 24 Am. Rep. 529, originated in a misunderstanding of the case of *Oakely v. Pasheller*, 4 Clark & F. 207, decided by the house of lords, Lord Lyndhurst delivering the opinion. An examination of the case will show that the opinion proceeds upon the assumption that the creditor in that case accepted the agreement as it was made between the parties, receiving into the partnership his son in law as a new debtor and converting one of the partners from a principal debtor into that of surety for the new firm. During the argument by the attorneys who were asserting the proposition that Judge Cooley announced in his decision of the case cited above, Lord Lyndhurst said, "Can you cite any authority to the effect that two original principal debtors could, by an arrangement among themselves, convert one into a surety only for the other principal debtor?" To which the counsel replied, "The letters and accounts and all the circumstances of this case make it quite clear that Sir C. Oakely accepted Reid & Kynaston as principal debtors looking to Sherard's executors as sureties." In the opinion, Lord Lyndhurst does not refer to the question of consent or not, but assumes that Sherard's estate had become surety for the new firm, and the whole tenor of the opinion shows that it was based upon the fact that the agreement made between the partners themselves and the new partner was accepted by the creditor. This is the construction placed upon the opinion by Cockburn, chief justice, in *Swire v. Redman*, L. R. 1 Q. B. Div. 536.

It is said by the chief justice in *Swire v. Redman*, L. R. 1 Q. B. Div. 536, that there is no English case which holds the doctrine that is contended for by those who claim that the agreement between the partners themselves without the consent of the creditor could change their relations to the latter, and we have found no decisions in the American courts which directly hold to that theory, except those we have herein cited, all of which rest upon the misinterpretation of *Oakely v. Pasheller*, 4 Clark & F. 207.

We therefore answer that one of two or more principal debtors cannot, by agreement among themselves, without con-

sent of the creditor, so ¹¹⁵ change the character of his liability to such creditor from principal to surety as to entitle him to the benefits of the provisions of the article of the Revised Statutes referred to. Under the facts stated, Wells did not become the surety of Chestnut in so far as it affected the rights of the Shapleigh Hardware Company, by the agreement made between the partners without consent of the creditor.

PARTNERSHIP—LIABILITY OF RETIRING PARTNER.—Creditors cannot be forced to submit to a change of debtors: *Cole v. Millerton Iron Co.*, 133 N. Y. 164; 28 Am. St. Rep. 615, and note. A retiring partner remains liable for all the existing debts of the firm to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm unless they become parties thereto: *Rawson v. Taylor*, 30 Ohio St. 380; 27 Am. Rep. 464; *Winston v. Taylor*, 28 Mo. 82; 75 Am. Dec. 112. See monographic note to *Hahlo v. Mayer*, 22 Am. St. Rep. 763.

DEBTOR AND CREDITOR—SURETYSHIP.—As to when an apparent principal may show himself to be in fact a surety, see the extended note to *Grafton Bank v. Kent*, 17 Am. Dec. 416-419.

FOWLER v. BELL.

[90 TEXAS, 150.]

FOREIGN CORPORATIONS—COMITY.—A foreign corporation will not be permitted to exercise within the state powers which a domestic corporation is not by law allowed to exercise under the same circumstances.

FOREIGN CORPORATIONS, PREFERENCE BY.—If the laws of the state do not permit its domestic corporations which are insolvent and have ceased doing business to prefer one of their creditors, such preferences made by an insolvent foreign corporation, though valid in the state where made and where the corporation has its domicile, will not be permitted to operate in this state upon property here situated, because, upon such insolvency, the property became a trust fund for the benefit of the creditors of such corporation.

CORPORATIONS, PREFERENCES BY INSOLVENT.—An insolvent corporation which has ceased to do the business for which it was created cannot so dispose of its assets as to deprive creditors of the fair and just distribution thereof.

FOREIGN CORPORATION, MORTGAGE OF INTENDED AS A PREFERENCE.—A mortgage made by a foreign corporation while insolvent and after it has ceased to do business cannot be enforced or foreclosed against property in this state, nor can the judgment of foreclosure be sustained on the ground that the defendant has acquired such title as he has under proceedings which, if sustained, will prevent a fair and just distribution of the property of such corporation situate within this state among its creditors.

Mathis & Mathis and Herring & Kelly, for the plaintiff in error.

Carrigan & Hughes, for the defendant in error.

¹⁵⁵ BROWN, A. J. The court of civil appeals made the following statement of the case and conclusions of fact:

"On the first day of March, 1892, the McLeod Artesian Well Company, a private corporation created by the laws of Iowa, and domiciled there, executed to Mary E. Bell its note for one thousand dollars, for money loaned it by her, payable one year after date thereof. On the third day of June, 1893, the McLeod Artesian Well Company executed to Mary E. Bell a chattel mortgage dated June 3, 1893, conveying to her certain property situated in Wichita Falls, Texas, belonging to said company, for the purpose of securing said debt. The mortgage was signed and acknowledged by John R. Craig, the president of said company, on the third day of June, 1893, in Iowa, and was sent by him to Rice B. Bell, secretary and treasurer of the said company, who was then temporarily stopping at Wichita Falls, Texas, who also signed and acknowledged said mortgage on the twenty-first day of June, 1893, at Wichita Falls, and deposited and filed the same on that day with the county clerk of Wichita county, Texas, to be registered as a chattel mortgage. At the date of the execution of this mortgage, the McLeod Artesian Well Company, by its same officers, executed two other mortgages conveying this property and all its other property in Texas, except a few articles at Fort. Worth, Texas, of nominal value, one to secure Mrs. Craig in the sum of two thousand dollars, and one to secure Mrs. Sanford in ¹⁵⁶ the sum of one thousand dollars. The McLeod Artesian Well Company is a corporation incorporated by the laws of Iowa in 1891, its stockholders all being residents of Iowa. It has always maintained its principal office at Keokuk, in the state of Iowa, and its president and its officers all reside in said state. Said mortgage was executed in the state of Iowa for the purpose of securing Iowa creditors. At the time of the execution of said mortgage the McLeod Artesian Well Company was insolvent and had ceased to do business. The laws of Iowa allow an insolvent corporation that has ceased to do business to prefer its creditors. Such power is granted to it by the laws constituting its charter. Said mortgage in favor of Mary E. Bell was given on property situated in Wichita county, Texas, and the same was properly filed and registered by the clerk of said county on the twenty-second day of July, 1893, and, after said mortgage had been properly filed, W. R. Kent brought suit in the

county court of Wichita county, Texas, against the McLeod Artesian Well Company for nine hundred and seventy-two dollars, and in said suit procured a writ of attachment and caused it to be levied upon the property described in said mortgage, and, after said judgment in said cause in his favor foreclosing said attachment, had said property sold under an order of sale issued from said court on the fourth day of October, 1893, at which sale W. R. Kent bought in all of said property for the sum of thirty dollars. Afterward, to wit, on or about the first day of February, 1893, he sold said property, which was then situated in Wichita Falls, Texas, to J. W. Sparger, and Sparger sold it to J. B. Fowler, and delivered the same to him in Hill county, Texas. That at the time of said attachment and sales the mortgage of Mary E. Bell was on file in the office of the county clerk of Wichita county, Texas, and the property was also in said county. On the sixth day of October, 1893, the appellee, Mary E. Bell, brought this suit in the district court of Wichita county, Texas, against the McLeod Artesian Well Company, on said note for one thousand dollars, interest and attorney's fees, and to foreclose said chattel mortgage given to secure said note. W. R. Kent was made a party defendant in this suit. On the twenty-seventh day of March, 1894, the appellees filed an amended original petition in this suit in which they made J. B. Fowler a party defendant, alleging that he had converted a portion of said property for which Mary E. Bell had a mortgage, and asked for a judgment against said Fowler for the value thereof. On the twenty-fourth day of November, 1894, the case was tried before the district judge without a jury, wherein he rendered a judgment in favor of the appellee against said artesian well company for the amount of her debt, interest, and attorneys' fees, also foreclosing her said mortgage lien as against all defendants, also rendered judgment in favor of appellees against defendant J. B. Fowler for the value of the property taken by him. J. B. Fowler alone prosecutes this appeal."

The only question which we find it necessary to consider is, Was the mortgage given by the McLeod Artesian Well Company in favor of Mrs. Bell valid? If it was not, she cannot maintain this suit to foreclose it, ¹⁵⁷ whether the defendant acquired title or not under the judgment foreclosing the attachment lien.

The question involved is this, Could the McLeod Artesian Well Company, a corporation doing business in this state, but created under the laws of the state of Iowa, being insolvent and having ceased to do business, make a mortgage upon its property in this state giving a preference to one or more creditors over

others, which mortgage a corporation created under the laws of this state could not have made under similar conditions? In other words, do the general laws of another state govern in the interpretation of a contract made by a corporation of such state with reference to its property situated in this state, when such contract is in violation of the laws or public policy of this state?

Mr. Thompson, in his recent work on Corporations, volume 6, section 7885, states the rule, which we believe to be correct as follows: "Without attempting to enumerate in a single section all the cases to which this comity does not extend, it may be observed, in the first place, that it does not extend so far as to concede to foreign corporations the powers which their own charters do not permit them to exercise, nor so far as to permit a foreign corporation to exercise powers within the state which a domestic corporation of the same kind is not permitted to exercise under the constitution and policy of the state." :

This rule is well sustained by the authorities, of which we cite the following: *Falls v. United States etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194; *Guilford v. Western Union Tel. Co.*, 59 Minn. 332; 50 Am. St. Rep. 407; *Hutchins v. New England Coal etc. Co.*, 4 Allen, 580; *Milnor v. New York etc. R. R. Co.*, 53 N. Y. 363; *Rorer on Interstate Law*, 288.

Morawetz on Private Corporations, section 976, volume 2, states the proposition thus: "It is the charter alone which is recognized by the law of comity and not the general legislation of the state in which the corporation was formed. The word 'charter' is here used to signify the agreement between the shareholders of the corporation, whether this agreement be contained in a special act of the legislature or in articles of association or in either of these taken in connection with certain general laws of the state.

"The law of comity merely enables the corporators to exercise the franchise of acting in a corporate capacity in foreign states, and the extent of this franchise is determined by the agreement entered into when the charter was accepted. The laws of the state where the corporation was formed by the agreement of the corporators are regarded only so far as they determine the scope and validity of this agreement itself.

"The general laws and regulations of a state are intended to govern only within the limits of the state enacting them, and the state would have no power to give them extraterritorial force. . . . It follows, therefore, that if a statute enacted by a state, whether as a general law or a special provision in the charter of a corporation, was enacted for the enforcement of a local policy

only, it would not be presumed that ¹⁸⁸ such statutory provision was intended by the state or by the shareholders forming the corporation to enter into the charter contract and to regulate the company in its transactions outside of the state, and such enactment will, therefore, not affect the validity of the dealing of the company in foreign states."

Applying these principles of law to the facts of this case, it follows that, if the mortgage in question was made contrary to the laws of this state or to its public policy, it is void, and conferred no rights upon the mortgagees. A corporation created in this state, which has become insolvent and has ceased to carry on its business, cannot make any disposition of its property which gives a preference to one or more creditors over others, for the reason that, upon insolvency and cessation of the business, the assets of the corporation by operation of the law becomes a trust fund in the hands of its directors to be disposed of for the benefit of its creditors, and any disposition which discriminates between such creditors is a violation of that trust: *Lang v. Dougherty*, 74 Tex. 226; *Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143.

If the McLeod Artesian Well Company had been a domestic corporation, and had made the mortgage in question under the same conditions, it would be void because contrary to the laws and public policy of this state, as declared in the decision of its court as above cited; and it must be so held in this case, unless its validity can be supported upon the ground that it is sustained by the laws of the state of Iowa.

Counsel for the defendants in error claim that the mortgage in question in this case is valid for the following reasons: 1. That there is no law in Texas which renders such transaction invalid, but that the decisions of our courts, and especially that of *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143, rest upon the ground that the statutes of this state do not confer upon corporations power to make such instruments; 2. Because the transaction is to be governed by the laws of Iowa, where the contract was made, and in which state it would be valid, and not by the laws of Texas.

In the case of *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143, Judge Stayton reviewed the authorities exhaustively to show that an insolvent corporation which had ceased to do business could not make a mortgage giving preferences to some creditors over others, for the reason, which we have before stated, that upon the happening of such conditions the directors of the corporation by operation of law become trustees charged with the distribution of its assets among all of its cred-

itors, and, thus being constituted trustees, they could not deprive the beneficiaries of that trust of their proportionate part of the assets of the corporation by means of conveyances of the property so held to one or more of the creditors in preference to the others. The decision is not placed upon the ground that the authority is not conferred upon the corporation by the laws of this state, as is insisted by counsel for the ¹⁵⁰defendant in error, but in that case it was insisted that a corporation had the inherent right at common law to make such a conveyance. Judge Stayton conclusively showed, from the best-considered authorities, that the rule claimed applied only to common-law corporations, and not to those created by statute, and then, in order to conclusively show that the rule announced as applicable to insolvent corporations applied in this state under such circumstances, he examined our statutes, from which examination it appeared that no such authority had been either directly or by implication conferred upon corporations in this state. That case clearly settled the law upon this question in Texas, and it is no longer open to controversy that an insolvent corporation cannot, in this state, when it has ceased to perform the business for which it was created, dispose of its assets so as to deprive its creditors of a fair and just distribution of the same.

In support of the second proposition above stated, it is claimed that this mortgage having been executed in Iowa, where the law permitted such disposition of the property, it is to be governed in its construction and enforcement by the laws of that state. We will remark, however, that it was made with a view to its enforcement in Texas, and embraced alone property situated in Texas. In support of the position taken by counsel, above stated, the following cases are cited: *Ryan v. Missouri etc. Ry. Co.*, 65 Tex. 13; 57 Am. Rep. 589; *Weider v. Maddox*, 66 Tex. 372; 59 Am. Rep. 617; *Rue v. Missouri Pac. Ry. Co.*, 74 Tex. 479; 15 Am. St. Rep. 852.

We will briefly review some of the cases cited by the defendant in error, which in our opinion are not in point as authority upon the question here involved.

In the case of *Ryan v. Missouri etc. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589, the question was whether the law of Missouri or the law of Texas should govern in the construction of a contract for the shipment of goods from St. Louis into Texas over the Missouri, Kansas & Texas Railroad. It was a case in which performance of the contract began in Missouri and terminated in Texas, and the court held that under such circumstances the law of the place of making the contract would be applicable.

In *Weider v. Maddox*, 66 Tex. 372, 59 Am. Rep. 617, an assignment made in the state of Missouri in accordance with the laws of that state, which embraced personal property situated in Texas, was upheld against the lien of an attachment levied in this state after the assignment was executed and recorded; but it was expressly shown by the opinion that the terms of the assignment did not in any way conflict with the assignment law of this state.

Rue v. Missouri Pac. Ry. Co., 74 Tex. 479, 15 Am. St. Rep. 852, involved the validity of a contract made under these circumstances: Talmage, the general manager of the railroad company, entered into a contract with Rue, by which the latter was appointed stock agent for the railroad company in Texas at a salary of two thousand dollars a year, and, in addition thereto, the stockyards and feeding pens at several points in Texas and in the Indian Territory were leased to Rue for a number of years and he given the exclusive right to feed cattle ¹⁰⁰ shipped over that railroad. By the terms of the contract, the profits of this business were to be divided between Rue and Talmage, which was in violation of the constitution and laws of the state of Missouri, in which state the contract was made and in which state likewise the railroad company was chartered. There was no law in Texas which would uphold such a contract as that made between these parties. The contract was so obviously contrary to good morals, fair dealing, and honesty toward the railroad company on the part of its officer, participated in by Rue, that it

- would seem to have been contrary to the public policy of this state, and therefore there was no conflict between the law of Missouri and the laws or public policy of Texas upon this question.

We are not called upon in this case to approve or dissent from the opinion delivered in that case. It is not authority in the case now before the court and cannot be held to control or influence a decision of the question now under consideration.

Defendants in error's counsel cite matter of *Estate of Prime*, 136 N. Y. 347, as relevant to the questions under discussion. The only point in that case which could be considered as in the remotest degree akin to this is thus expressed in the syllabus of the case: "A state statute granting powers and privileges to corporations, in the absence of plain indications to the contrary appearing on the face of the act, applies only to corporations created by the state." Manifestly, that case has no relevancy to any question now before the court.

In *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545, cited by counsel, the court refused to sustain an assignment, made by

a Wisconsin corporation doing business in the city of New York, of personal property in that state, because the law of Wisconsin upon the subject of assignments required creditors to accept the assignment and discharge the assignor, and was considered by the New York court to be in the nature of a bankrupt or insolvent law. If at all applicable, that case does not sustain the contention of the defendant in error. We deem it unnecessary to review the case at greater length.

We are earnestly asked to carefully examine *Vanderpoel v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601, which, upon careful examination, we find to be a case in which a corporation created under the laws of New Jersey, doing business in the state of New York, made a general assignment for the benefit of all of its creditors without preferences. An attachment was levied in the state of New York upon the property assigned and the assignee brought suit to recover damages for the levy upon and sale of the property. The defendant in that suit claimed that the assignment was void on account of the provisions of a statute of the state which, among other things, provided: "That no corporation shall make any transfer or assignment to any person whatever in contemplation of its insolvency, and every such assignment is declared to be void." It was claimed that the foreign corporation was embraced in the general language of this statute. The court held that the law above quoted did not apply to foreign ¹⁶¹ corporations. That court also held that the right to make such an assignment as was made in that case was inherent in all corporations unless prohibited, and not being prohibited to the foreign corporation by the terms of the statute, the assignment was not violative of any law in the state of New York. There are two marked distinctions between that case and this: 1. The instrument in that case was of a character which the laws of New York permitted to be made and which the courts of that state held all corporations had the inherent power to make, unless restrained therefrom. In this case the instrument is one which the courts of this state held that no corporation has the power to make unless authorized by statute of this state. 2. In that case the instrument was a general assignment distributing all of the assets of the corporation equally among the creditors, which is not denounced by any decision in this state. While the instrument in this suit is one which is not approved by the New York case, but is directly and emphatically denounced by the laws of this state as embodied in the decisions of its courts. The two cases are so dissimilar that the one is not authority in the consideration of the other.

It is also claimed by the defendant in error that, since the plaintiff in error is not seeking to have the property equally distributed among all the creditors of the corporation, he cannot prevail in this suit, and *Lang v. Daugherty*, 74 Tex. 226, is cited in support of that proposition. The defendants in error were plaintiffs in the lower court, in which they did not seek an equal distribution of the proceeds of the property among the creditors of the corporation, but sought to apply it all to the satisfaction of their debt. The doctrine announced in the case last cited applies with great force to the rights of the defendants in error, and effectually denies to them any right to recover in this case, the mortgage which they are seeking to foreclose being held invalid. The fact that the plaintiff in the attachment suit proceeded contrary to law and appropriated to his exclusive use a part of the trust fund will not justify the courts in taking from the purchaser that which was unlawfully appropriated, and with no greater legal right in them, turning the property over to the defendants in error, to be by them applied to their exclusive benefit.

If the power claimed for the Artesian Well Company had been explicitly expressed in its charter, it could not have been exercised in this state by that corporation, because in direct conflict with the laws and policy of this state, and in such conflict the law of this state must prevail over the foreign law: *Falls v. United States Bldg. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194.

We hold that the mortgage executed by the McLeod Artesian Well Company to Mrs. Bell was null and void, and that the district court erred in foreclosing it upon the property embraced therein and in giving judgment against the defendant Fowler for the said property, or the value of any part thereof, and that the court of civil appeals erred in affirming ¹⁶² the said judgment. It is therefore ordered that the judgments of the district court and the court of civil appeals be reversed as between the plaintiff in error and the defendants in error, and the judgment here be rendered that no foreclosure of the said mortgage be had upon the said property, and that the said J. B. Fowler, the plaintiff in error, go hence without day, and that he recover of the defendants in error, Mary E. Bell and Rice H. Bell, all costs in this behalf expended in all of the courts.

Reversed and rendered.

CORPORATIONS—INSOLVENT—RIGHT TO PREFER CREDITORS.—It is settled by a majority of the decisions that a corporation, though insolvent, may, where it has possession and control of its property, and in the absence of fraud or statutory restriction, prefer a bona fide

creditor by a deed of trust on its property, or by a mortgage, sale, assignment, or otherwise: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 76. In some states, such preferences are invalid in cases where a corporation has already ceased to do business, or the preference in question is of such character and extent that its operation must be to compel such ceasing: Monographic note to *Conover v. Hull*, 45 Am. St. Rep. 829; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 85 Tenn. 634; 49 Am. St. Rep. 943, and note.

CORPORATIONS—FOREIGN—CONFLICT OF LAWS.—A corporation which performs corporate acts in a state other than its domicile, and seeks to enforce rights there, can exercise no exceptional rights and privileges which are conferred by the law of its creation, if such enforcement involves a breach of the public policy or statutory system of the state where such rights are sought to be enforced: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194, and note; notes to *American etc. Co. v. Farmers' etc. Co.*, 46 Am. St. Rep. 288; *Rothrock v. Dwelling House Ins. Co.*, 42 Am. St. Rep. 420, 421.

ROYAL INSURANCE COMPANY v. MCINTYRE.

[96 TEXAS, 170.]

INSURANCE—EVIDENCE TO PROVE WHETHER THERE HAS BEEN A TOTAL LOSS.—Expert witnesses may be permitted to testify, where a claim is made that a total loss has occurred, as to the cost of restoring to its original usefulness a building which has been injured by fire and as to the portion of the building which has been destroyed, and that which remains substantially unimpaired, and that the building can be renewed and rebuilt.

INSURANCE, TOTAL LOSS, WHAT IS.—A vessel is deemed to be a total loss if a prudent uninsured owner would not undertake to rebuild it.

INSURANCE—TOTAL LOSS—COMPLETE DESTRUCTION NOT ESSENTIAL TO.—An insured building may be a total loss from the peril insured against, though it is not wholly destroyed, if what remains is not valuable as a building, and must be regarded as mere debris, though, as such, it has some value.

INSURANCE, TOTAL LOSS, WHAT IS NOT.—There can be no total loss of a building so long as what remains is reasonably adapted for use and as a basis upon which to restore the building to the condition in which it was before the injury, and whether it is so adapted depends upon whether a reasonably prudent and uninsured owner, desiring such a structure as the one in question was before injured, would, in proceeding to restore the building to its former condition, utilize such remnant as such basis.

W. J. J. Smith and Oeland & Littleton, for the plaintiff in error.

McCormick & Spence, for the defendant in error.

¹⁷¹ DENMAN, A. J. McIntyre brought this suit against the Royal Insurance Company, alleging in substance that said company issued to him upon his two and one-half story frame building a policy of \$2,000, additional concurrent insurance for \$1,500 having been permitted ¹⁷² in another company; that

while said policy was in full force the house was totally destroyed by fire, whereby loss occurred to him of \$3,500 and whereby defendant became liable and promised to pay him said \$2,000, for which he sought judgment.

The insurance company answered, among other things: 1. A general denial; 2. That the policy sued on contained a stipulation to the effect that if there be other insurance on the building said company should be liable for no greater proportion of the loss sustained than said \$2,000 might bear to the whole amount of such insurance; that the building was not a total loss, but was only damaged to the extent of \$1,887; that in addition to the policy of \$2,000 issued by defendant, the German Insurance Company had a policy thereon amounting to \$1,500; that if defendant is liable to plaintiff, it is only liable for four-sevenths of said \$1,887, to wit \$1,076.28, the same being its proportionate amount of damage caused to the building by the fire.

Thus it will be observed that plaintiff sought to recover for a total loss, while the defendant contended that the loss was not total, but that the house was merely damaged.

According to the testimony of plaintiff, the roof was burned off and the east wall, where the fire caught from an adjoining building, was practically destroyed, and the rooms in the attic as well as the attic floor were ruined, but the second and lower stories, together with the partitions, doors, windows, blinds, the south, west, and north walls, were still standing in position and not injured to any great extent; the plastering, papering, and floors, and the finish of the woodwork inside was very much damaged by water; and, taken as a whole, the building was totally ruined.

O'Riley, witness for defendant, testified that the debris of the roof was all piled on the attic floor, but the fire did not burn through the floor; that there was a little stairway leading from the second to the third floor, and where the fire had fallen down this stairway it had burned it; that the cornice on the inside all round the building was charred and injured so as to necessitate taking it off and replacing it; that all the laths and a greater part of the ceiling over the second story were still on; that the building was not burned anywhere on the inside below the attic floor except a portion in the extreme east of the kitchen and the room upstairs over the kitchen; that the damage did not extend below the third or attic floor of the building; that a greater portion of the weather-boarding on the east wall—that is the front portion of the east wall—would only require repainting; that about two-thirds of the weather-boarding of the east wall

was entirely burned off and only about two-fifths unfit for use; that none of the storm sheeting of the east wall was burned off, and all could be used in rebuilding, but it was charred—probably one-half of it had been injured and charred in some way by the fire; that there were no holes burned through the east walls; that none of the sash of east wall were out of place, yet several of them were damaged to such an extent they could not be used; that some of the blinds of the windows on the east wall were still in ¹⁷³ position and could be used; that the base and water table of the east wall were perfect; that none of the studding of the east wall was entirely burned away; that none of the east wall was out of plumb or in danger of falling; that there was not a wall in the building that was out of plumb; that only a small portion of the studding on the east wall had been charred and injured at all by the fire, it having been protected by the sheeting, none of which had been burned through; that to make the wall as good as new, two or three of the studding will have to be taken out. With the exception of the specific injuries to the building above stated, the general tenor of this witness' testimony was to the effect that the house was not injured except some damage to the plastering and interior finish in different portions of the house by water.

The testimony is quite voluminous and not necessary to be stated, but we have given a portion of that of the two witnesses above without undertaking to give their language or to state the facts in the order in which they appear in the testimony, in order that the general tenor of the testimony on each side may be understood.

The defendant offered to prove by several expert witnesses "the cost of repairing and restoring said building to its original usefulness, strength, and utility; that this could be done at a cost of from \$1,200 to \$1,800; the value of the material still uninjured in said house, and that the same was worth about \$2,500; that the value of the house after the fire was about \$2,500; that about ninety per cent of the material still in the house after the fire was uninjured, and that the remainder of said building could be used for reconstructing said building; that only about twenty per cent of the building had been destroyed; that the building could be renewed and rebuilt without tearing it down; that the greater portion of said building remained still uninjured and intact and that by replacing the damaged portions the building would have been as good as new"; which evidence was excluded by the court, to which action of the court defendant duly reserved its bill of exceptions. The plaintiff recovered a judg-

ment against defendant for the full amount of the policy, which judgment having been affirmed by the court of civil appeals the cause has been brought to this court by the insurance company assigning as error the action of the court of civil appeals in holding that the trial court did not err in excluding said testimony.

We have not been able to find, either in the cases or text-books, any instance in which the admissibility of such evidence has been challenged, and therefore know of no direct authority upon the question; but a careful reading of many reported cases, both upon maritime and fire insurance, convinces us that such evidence has been generally received, upon the issue as to whether the loss was total or partial, both in the English and American courts: *Aranzamendi v. Louisiana Ins. Co.*, 2 La. 432; 22 Am. Dec. 136; *Saltus v. Ocean Ins. Co.*, 12 Johns. 107; 7 Am. Dec. 290; *Rosette v. Gurney*, 11 Com. B. 176; *Grainger v. Martin*, 2 Best. & S. 456; *Moss v. Smith*, 9 Man. G. & S. 93; *Adams v. McKenzie*, 13 Com. B., N. S., ¹⁷⁴ 442; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204; 4 Am. Rep. 664; *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640; *Ampleman v. Citizens' Ins. Co.*, 35 Mo. App. 308-320; *Harriman v. Queen Ins. Co.*, 49 Wis. 71; *Brady v. North Western Ins. Co.*, 11 Mich. 426-449; *Williams v. Hartford Ins. Co.*, 54 Cal. 442; 35 Am. Rep. 77.

But while the apparent general reception of such evidence, in the absence of an objection to or discussion of its admissibility, tends to show the consensus of opinion as to its competency among the many learned writers, advocates, and jurists who have been called upon to deal with the intricate question as to whether a loss was total or partial, nevertheless the subject is not entirely free from difficulty. This difficulty grows out of the inadequacy of language to so definitely express the legal conception of "total loss" as clearly to include every proper case and exclude every improper one. For if the rule could be stated in language susceptible of only one construction, then there would be little difference of opinion as to what evidence would be proper as tending to include or exclude a given case from its terms. In *Hugg v. Augusta Ins. etc. Co.* (1849), 7 How. 595, which was a suit to recover upon a policy of insurance on the freight of a vessel, the policy containing a memorandum clause, the court undertook to lay down the rule as to total loss of cargo so as to deprive the vessel of the opportunity of earning freight for its carriage, as follows: "If the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its

original character at Nassau, the port of distress, or that a total destruction would have been inevitable from the damage received, if it had been reshipped, before it could have arrived at Matanzas, the port of destination." The opinion places stress upon the proposition that the real test of total loss in such cases is whether there is a destruction in specie rather than in value, but there is nothing said to indicate that evidence of value would have been inadmissible in order to determine whether there had been a destruction in specie.

In *Great Western Ins. Co. v. Fogarty* (1873), 19 Wall. 640, the action was on a policy of marine insurance with memorandum clause insuring certain machinery to be transported by vessel from New York to Havana. Just before reaching the latter the vessel was wrecked and abandoned to the underwriter, whose agent at Havana took possession and was engaged about a month in raising the cargo. A large number of pieces composing plaintiff's machinery were recovered and tendered to him at Havana, which he refused to receive, on the ground that the insurance company was liable to him as for a total loss, and for that the action was commenced. The insurance company denied that there was a total loss. The evidence showed that machinery was all of iron, "about half of its weight was saved and the remainder left at the bottom of the sea. That which was saved was entirely useless as machinery and was of no value except as old iron, for which purpose it would sell for about \$50. The machinery in working order was worth \$2,250. That ¹⁷⁵ which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use, than to buy a new machine." Throughout this opinion it is apparent that the court considered the evidence that it would cost more to repair or polish and put in order for use the old machinery than to buy new as very important in determining whether the machinery had been destroyed in specie. We apprehend that the decision would have been the same if every piece of the machinery had been recovered in its original form, unbroken and uninjured, except that it was so rusted from the action of the water "that it would cost more to polish it and put it in order for use than to buy a new machine." Thus we think the court in this case, while adhering to the rule laid down in the case next above cited, that in order to constitute a total loss there must be a "destruction in specie," clearly recognized the fact that the adaptability of the recovered pieces of machinery to the uses for which they were originally intended was the real practical test as to whether there had been a "destruction in specie" within the meaning of the rule, and

further that the probable cost of polishing and putting it in order for use was an important element in determining whether it had, when rescued from the wreck, lost such adaptability; for Justice Miller, who delivered the opinion, says: "If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine—had lost it so entirely that it would cost as much to buy a new piece just like it as to repair or adapt that one to the purpose—then there was a total loss of the machinery. If no piece recovered was of any use or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the machinery saved, however much of rusty iron may have been taken from the wreck."

In the leading case of *Irving v. Manning*, 6 Man. G. & S. 391, decided in the house of lords, the suit was upon a policy for £3,000, claiming total loss of the ship insured, which was valued in the policy at £17,500, it being what is technically known as a valued policy. The special verdict showed "that the vessel during the voyage was so damaged as to be incompetent to proceed without repairs; that the necessary expenditure in order to repair her and make her seaworthy would have amounted to £10,500, and that the ship would have been then worth £9,000 only, which was her marketable value then and at the time of the policy; that a prudent owner, uninsured, would not have repaired the vessel; and that she was duly abandoned to the underwriters." The effect of a valued policy is, that the valuation of the ship agreed upon is, in the absence of fraud pleaded and proved—which was not done in this case—to establish as conclusive the value agreed upon as the true value of the property for purposes of recovery. In this case, however, the insurance company contended that the agreed valuation of £17,500 should also be taken as conclusive of what the ship would have been worth, if the £10,500 had been expended in repairing it, instead of permitting its real ¹⁷⁶ value, as found by the special verdict, of £9,000 after repairs, to be looked to. If this contention of the company had been correct, then, under the English rule which makes the test of total loss of a ship depend upon whether it cost more to repair it than the ship would be worth after it had been repaired, there would clearly have been no total loss, because the £17,500 agreed valuation was in excess of the £10,500 estimated as necessary to repair. The court, however, held that the contention of the company could not be maintained, but that the usual test applied in the English courts in such cases must apply to valued policies, and since the £10,500 estimated as necessary cost of repairing

was greater than the £9,000 estimated value of the ship after it was repaired, there was a total loss. In the course of the opinion delivered by Patterson, J., he said: "If this had not been the case of a valued policy, it is clear that on facts found there was a total loss, for a vessel is totally lost within the meaning of the policy when it becomes of no use or value as a ship to the owner, and is as much so as if the vessel had gone to the bottom of the sea, or had broken to pieces and the whole or great part of the fragments had reached the shore as a wreck; and the course has been, in all cases in modern times, to consider the loss as total, where a prudent owner, uninsured, would not have repaired." Again, in the course of the opinion, it is said: "The principle laid down in these latter cases is this—that the question of loss, whether total or not, is to be determined just as if there was no policy at all, and the established mode of putting the question, when it is alleged that there has been what is, perhaps improperly, called a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against. If he would not have repaired the vessel, it is deemed to be lost." This and other English authorities heretofore cited in this opinion show that the rule is settled in English practice that the test by which it must be determined whether there has been a "total loss" of a ship is whether she has received such extensive damage that it would not be reasonably practical to repair her so as to adapt her to the uses for which she was originally intended, and that in determining whether it is reasonably practical to so repair her, the true inquiry is, "what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against"; that question being answered, in most cases at least, by a determination of the comparative cost of such repairs with the actual value of the ship after repaired. Thus it appears that, under the English rule, testimony as to the cost of repairs is of very material character and no question could be made as to its admissibility.

We do not undertake to determine whether there is any distinction between the principles which should govern in determining what is a total loss of a ship or cargo under policies of marine insurance and those of ordinary fire insurance, as that question is not before us, but since the American cases, undertaking to lay down the rule whereby it is to be determined¹⁷⁷ whether a loss is total or partial under an ordinary fire insurance

policy, have apparently been based upon marine insurance cases, we have deemed it proper to briefly state our conclusion as to the doctrine established by the above cases preparatory to a review of some of the leading fire insurance cases upon the question of total loss, which we will now proceed to examine.

In the leading case of *Williams v. Hartford Ins. Co.*, 54 Cal. 449, 35 Am. Rep. 77, the evidence, as far as stated, was as follows: "The building was entirely burned out. It had every appearance of being a fire of great heat. Portions of the old wall were standing—that is, in position; they were all cracked and warped, wherever joists had been in, they were badly torn out, apparently from the falling of the joists. It was so perfect a destruction, that I, as well as the architect who examined it with me, placed it as a total destruction—that is was perfectly worthless as a building. In my own mind I deemed the building worthless. That which was left standing would just amount to debris. It was a wall which was unfit for use with any safety. I thought we would have to tear it down to make a new wall. It would have to be torn down and replaced—that is, another wall built in its place. I have been an extensive builder. . . . The shutters were warped and blistered, and injured to such an extent that I considered them perfectly worthless for any purpose, even as old iron, unless you might get some of the bands on the wrought-iron portion. The balance of the ironwork—the pillars, for example—they were all warped so much that, while you might use them, you could not use them to make a perfect wall as it was before; hence, I class that simply as old iron.' The witness further testified, that after the fire he sold his interest in the ground upon which the building had been erected, to one Douglas, and told him, so far as the old debris was concerned, he could take it, that he did not care anything about it." The trial court charged the jury as follows: "A total loss does not mean an absolute extinction. The question is not whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. Although you may find in fact that after the fire a large portion of the four walls were left standing, and some of the ironwork still attached thereto, still, if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy"; which charge was held not to be error. The charge was evidently based upon the rule announced in *Hugg v. Augusta Ins. Co.*, 7 How. 595, referred to above. There was no question made in that case as to the ad-

missibility of evidence tending to show the adaptability or practical usefulness of the old walls as a basis of restoring the building to its original condition, nor as to evidence showing what the probable cost of such restoration with the use of the old walls would have been in order to determine whether a prudent uninsured owner would have undertaken to repair the building or would have treated it as a total loss and cleared ¹⁷⁸ away the ruins and rebuilt. Therefore, we cannot regard this case as deciding any more than that, with no objection to the evidence and with no special charge asked presenting the issue omitted by the court as to what a prudent owner would have done under the circumstances, there was no affirmative error in the charge of the court necessitating a reversal. It is certainly not authority for the ruling of the court in excluding the testimony in the case before us, and we apprehend that, if there had been evidence offered tending to show that by the use of the old walls as a basis for the structure the building could have been repaired and made as good as it originally was at a less cost than the amount of insurance, its exclusion could not have been justified under the spirit of either the English cases or of *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640, above reviewed, but that under those cases it must have been admitted as a circumstance to enable the jury to determine the question of fact as to whether the loss was total or partial.

We do not regard the cases of *Nave v. Home Mut. Ins. Co.*, 37 Mo. 430, 90 Am. Dec. 394, and *Huck v. Globe Ins. Co.*, 127 Mass. 306, 34 Am. Rep. 373, cited in the opinion of the court in *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 35 Am. Rep. 77, as having any bearing upon the question under consideration, and therefore do not deem it necessary to review the same.

In *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, under a similar statute to ours, the question was, whether the loss was total, and the court say: "The evidence is, that all the combustible material in the structures was destroyed, and although portions of the brick walls were left standing, yet they were useless as walls, and many, perhaps most, of the bricks therein were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all the parts thereof. This was an entire destruction of the buildings, within the meaning of the statute: 1 Wood on Insurance, sec. 107. The jury were so instructed." Thus it will be observed that the court finds that the evidence conclusively shows that the portions of the walls which were left standing were useless as walls,

and that many, perhaps most, of the bricks therein were spoiled by the heat, and upon that finding of fact conclude that the court below correctly instructed the jury that there was a total loss. The language used indicates that the court based its opinion that the identity and specific character of the buildings were destroyed upon the fact established by the evidence that the walls were useless as walls. We are not informed as to what evidence was contained in the record from which the court drew the conclusion of fact that the walls were useless as walls, but certainly upon such issue there can be no doubt but testimony as to the adaptability of the walls as a basis for restoring the building to its original condition, and the probable cost of so doing, would have been competent. Citing this case, the supreme court of Nebraska, in *German Ins. Co. v. Eddy*, 36 Neb. 461, without stating the particular facts before the court, in holding that the evidence ¹⁷⁹ justified a verdict of total loss, say: "What is the meaning of the words 'wholly destroyed' when applied to a building? If the building was constructed of brick or other noncombustible material, fire could not destroy that. Therefore, the brick or other material not destroyed would have some value, which the party retaining should pay for. From the nature of the case, therefore, the words referred to do not mean the debris from the building destroyed. This may have some value, and if so the insurance company, if it pays the loss, is entitled to compensation for. The words, when applied to a building, mean totally destroyed as a building; that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding and must be torn down and a new building erected throughout. . . . There is abundant proof in the record that such was the situation of the building in the case at bar after the fire." We are of opinion that the observations made by us in reference to *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, are also applicable to this case, and that the same may be said of *Insurance Co. of North America v. Bachler*, 44 Neb. 549.

In *Harriman v. Queen Ins. Co.*, 49 Wis. 71, the special verdict showed that the property insured was totally destroyed by fire; that no portion of the brick walls of the building could be used for rebuilding it after the fire; that the foundation left after the fire was not sufficient to support a building of the same weight and dimensions of the building burned; that a new building like the one burned could not have been built upon the same spot after the fire without incurring expense in getting rid of worthless fragments of the old building, at least equal to the full value of all that was left of the building burned, and that the materials

left after the fire were not of as much value for any useful purpose as the expense would have been of getting the same out of the wreck of the building as it was left by the fire. In passing upon the question as to whether a total loss was shown, the court held that the findings of the jury were supported by the evidence, and showed that the building was a total loss within the meaning of the statute. The testimony is not given, but it is clear that testimony of the character excluded by the court below in the case before us must have been introduced and considered of the most material nature in the court below.

In *Oshkosh etc. Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 200, the court instructed the jury that the undisputed evidence showed a total loss of the building, but, as the evidence is not stated, we cannot determine whether the case has any bearing upon the question before us or not.

In *Brady v. North Western Ins. Co.*, 11 Mich. 426, it appears from the extracts of the evidence given in the statement of the case by the reporter and the opinions of Martin, C. J., and Campbell, J., that the action was brought upon a policy for \$2,000, claiming a total destruction of the building; that an ordinance passed by the city forbade the repair of any wooden building partially destroyed by fire in the district where the one in question was situated; that the building was injured by fire; that several ¹⁸⁰ witnesses on behalf of defendant testified what in their judgment was necessary to restore the building to the condition it was in immediately preceding the fire, but the effect of such testimony is not given; that the value of the building as left after the fire "for purposes of repair was more than half of its value before the burning, and amounted to from \$2,000 to \$3,000; while, if not allowed to be repaired, the materials were of very trifling value." The majority of the court held that the loss was total, on the ground that the ordinance forbidding the repairing of a building partially destroyed by fire was a part of the policy, and that the result of the fire taken in connection with the ordinance had caused a total loss of the building. Campbell, J., in a dissenting opinion, disagrees with the majority of the court in the result reached upon the ground that in his opinion the ordinance was void as to this policy, it having been enacted after the policy was issued, but, in a very learned and lucid opinion, shows that if the ordinance be valid, the opinion of the majority of the court is correct. In the course of his opinion, after referring with approval to the opinion rendered in the house of lords, as above stated, in *Irving v. Manning*, 6 Man. G. & S. 391, he says: "This rule seems to me very simple and entirely fair. It is the

only rule which can give to the insured the indemnity he bargained for. If, for any reason except a personal one, the repairing of the property would not be undertaken by a prudent owner who was uninsured, it would not be reasonable to admeasure damages upon another basis practically false. If repairs are absolutely impossible, the remnants are worth nothing except as lumber. It can, in my judgment, make no difference why the repairing cannot be done, if an insuperable obstacle exists. Any such obstacle affects the owner as severely as any other obstacle. Submission to the law is as incumbent as submission to any other necessity and must be regarded as equally unavoidable." The obstacle referred to as showing a total loss was the ordinance above referred to, supposing it to be valid; which, however, he afterward undertakes to show to be invalid. We are of opinion that the whole tenor of this opinion shows that the learned judges who at that time composed the court were of the opinion that the reasoning of the English cases above referred to is sound, from which it results that evidence of the character complained of in the case before us is admissible.

In *Ampleman v. Citizens Ins. Co.*, and *Ampleman v. North British etc. Ins. Co.*, 35 Mo. App. 308-320, the suit was upon a policy of insurance claiming total loss of a building. On the trial, the plaintiff gave evidence tending to show the fire substantially destroyed the building as a structure; that the woodwork, with the exception of one corner of the building, had been consumed so as to render it worthless, and that the brick walls had been materially injured, and were not fit to be used in the reconstruction of the building. Defendant gave evidence tending to show that two of the main walls were injured by the fire to such an extent that they would have to be taken down and replaced with new walls if the building was to be reconstructed, but that the two remaining walls were ¹⁸¹ substantially uninjured and could be utilized in rebuilding the structure without taking them down; that the entire insurance on the building was \$3,750, to wit, \$2,250 in the defendant company, and the balance in another; that the building could have been restored to its condition before the fire by utilizing the remaining walls fit for use and materials at a cost of less than \$2,200. In the first of said cases, the trial court in its charge instructed the jury as to what their verdict should be in case the building was "wholly destroyed" and what it should be if the building was "not wholly destroyed," but did not indicate to them the meaning of the term wholly destroyed, as used in the statute of that state, similar to ours. The court, in passing upon the meaning of the words, "wholly de-

stroyed," say that a building is "wholly destroyed only when no part of it above ground remains intact and substantially uninjured, and no such part of it can be utilized as a remaining standing structure, in effectually restoring the structure to its entirety," and held that the trial court erred in refusing the defendant's second instruction, which declared the law of the case applicable to the facts substantially as stated in the opinion. In the second case, the court held that the trial court erred in refusing the following instruction asked by the defendant: "'1. The court instructs the jury that if they find from the evidence that after said fire there remained any portion of the walls of said building that could be used for rebuilding it after said fire, and that such remaining walls were sufficient to support that part of a building of the same value, weight, and dimensions and construction as the building burned, and that by using these walls said building could be built for a less sum of money than if they were not to be used, then the building was not wholly destroyed.'"

Thus it is clear that the court were of the opinion that evidence of character excluded by the trial court in the case before us should have been admitted.

We do not wish to be understood in what we have said, in reviewing the cases above, as intimating that we approve or disapprove of any of them, except in so far as they indicate that the character of evidence excluded by the trial court in the case before us is admissible upon the issue of total loss.

To push the idea of "destruction in specie" to the extent of excluding all consideration of the adaptability of the remainder of the structure for use in restoring the building to its original condition, as seems to have been done in this case, would leave us with practically no guide, as it would be more difficult to determine the meaning of "destruction in specie," as thus limited, than of "total loss." It would logically result in denying recovery for a total loss in a case where the exterior form of the building remains, though the interior be so damaged that the entire remnant of the structure is valueless as a basis upon which to restore the building to its original condition, and would permit a recovery for a total loss in a case where an inexpensive portion of the building has been destroyed, though the most valuable and substantial portion remains uninjured ¹⁸² and capable of being utilized with great advantage in such restoration. To so hold would virtually be to abandon the principle of indemnity lying at the basis of all legitimate insurance, and to hold out to the

owner, instead thereof, a fair chance, if not an inducement, to profit by the partial destruction of his property.

After a careful consideration of the question, we are of opinion that there can be no total loss of a building so long as the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury; that whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before injury, would, in proceeding to restore the building to its original condition, utilize such remnant as such basis; that upon such issue the character of evidence offered and rejected in this cause is competent; that our statute providing that "A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy, provided, that the provisions of the article shall not apply to personal property" (Rev. Stats., arts. 3089-2971), does not affect the character of evidence admissible on the issue as to whether the loss is total, but merely affects the right of the parties in case of total loss.

For the error in excluding the testimony the judgment will be reversed and the cause remanded.

When Property is Deemed "Wholly Destroyed," or a "Total Loss," Within the Meaning of Contracts of Insurance Other Than Marine.

Policies of insurance undertaking to indemnify the insured from loss by fire often impose an absolute liability on the insurer only when there has been a "total loss" or the property has been "wholly destroyed," leaving him in other cases the right to repair or rebuild the property, and these, or other words of similar import, are sometimes used in such policies for other purposes, as where, upon a total loss, the assured, in the absence of fraud, becomes entitled to the amount of insurance specified in the policy, while, if the loss is partial, its amount may be fixed by arbitration, or otherwise adjusted. Whether there has been a total loss or an entire destruction within the meaning of these and like words used in a policy is usually a question of fact for the determination of the jury, under proper instructions from the court, though there may be cases in which, the facts being undisputed, the court may, as a question of law, decide that there has or has not been such a loss or destruction as is contemplated by the policy.

In the first place, it is now settled beyond all further controversy that to a total loss or entire destruction of the property it is not necessary that it be all reduced to ashes or cinders, nor even that it shall be so changed in form that what remains can no longer be identified as a part of that which was insured: *Insurance Co. of North America v. Bachler*, 44 Neb. 549; *Lindner v. St. Paul etc. Ins. Co.*, 13 Wis. 528. The words "wholly destroyed" and "total loss" are gen-

erally given the same meaning, and, when applied to a building or structure, do not require that the materials of which it is composed shall be utterly destroyed or obliterated, but only that the building, though some part of it remains standing, shall have lost its identity and specific character and have become a broken mass, so that it can no longer, with propriety, be designated as a building: Commercial etc. Co. v. Meyer, 9 Tex. Civ. App. 7; Oshkosh etc. Co. v. Mercantile Ins. Co., 31 Fed. Rep. 200. If the subject of insurance is a building or structure consisting partly of brick or other substances not destructible by fire, it is evident that there cannot be a total loss or a complete destruction in the physical sense of those terms, and that something must always remain and may often be of such appreciable value that it must be taken into consideration in estimating the amount of loss which has been suffered. This, however, does not show that the property has not been "wholly destroyed" or is not "a total loss" within the meaning of the policy, if it can no longer, with propriety, be regarded as a building. The question is not, whether all the parts and materials composing the building are absolutely and physically destroyed, but whether, after the fire, what remains has lost its identity and specific character as a building: Williams v. Hartford Ins. Co., 54 Cal. 443; 35 Am. Rep. 77; Barnard v. National etc. Ins. Co., 38 Mo. App. 106. Though the brick walls, or the greater portion of them, remain, yet, from the destruction of the roof and the interior portion of the building, it may have lost its character as such, and may properly be regarded as a "total loss" or as "wholly destroyed," especially if that which remains is liable to fall and must, therefore, be regarded as dangerous to the inhabitants of the city, who have a right to walk and be in such close proximity to the ruins as to be exposed to peril therefrom: Hamburg etc. Ins. Co. v. Garlington, 66 Tex. 103; 59 Am. Rep. 613. Though the foundations and cellar of an insured building remain entire, together with a great portion of the sills standing on top of the stonework, there is no error in instructing a jury that there has been a total loss of such building: Lindner v. St. Paul etc. Co., 93 Wis. 526. Undoubtedly, no matter how great a portion of the building may remain unconsumed, yet if it is so injured that it must be torn down or that what remains cannot be utilized in reconstructing the building without incurring greater expense than if it were not so utilized, the property must be regarded as having been "wholly destroyed": O'Keefe v. Liverpool etc. Ins. Co. (Mo.), 41 S. W. Rep. 922; Germania Ins. Co. v. Eddy, 36 Neb. 461; Harriam v. Queen Ins. Co., 49 Wis. 71; Seyk v. Millers Ins. Co., 74 Wis. 67. A mill and the machinery therein were insured for a sum specified, and the statutes of the state in which they were situated provided that, if the property insured should be wholly destroyed without the criminal fault of the insured or his assigns, the amount of the insurance written in the policy should be taken to be the true value of the property when insured and the true amount of loss and measure of damages, when destroyed. A small part of the machinery was afterward removed for the purpose of repairs. Thereafter the building and the remain-

der of the machinery were destroyed by fire, and it was claimed by the insurer that the removal and nondestruction of this small amount of machinery prevented the property from being "wholly destroyed" within the meaning of the statute. The court held that such was not the case, because "all the property covered by the policy at the time of the fire was wholly destroyed. The property insured was a mill, and the fire destroyed its identity and specific character as such. The words 'wholly destroyed' have been placed in statutes like this in many of the states of the Union, and, so far as we have been able to find, the construction appears to be uniform that, as applied to buildings, they mean totally destroyed as a building, although there is not an absolute extinction of all its parts. It matters not that some debris remains which may be useful or valuable for some purposes": *Havens v. Germania Ins. Co.*, 123 Mo. 408; 45 Am. St. Rep. 570.

It is error to instruct the jury that there has not been a total loss if any substantial or considerable portion of the walls of the building remain, so that they can be used in its reconstruction or repair. It is sufficient that the building has been so destroyed that no part of it remains intact or substantially uninjured, so that it cannot be utilized in effectually restoring the structure to its entirety. If walls, though standing, are rendered substantially unfit for use in a new structure, the building must be regarded as "wholly destroyed": *Ampleman v. Citizens' Ins. Co.*, 35 Mo. App. 308; *Ampleman v. North British Ins. Co.*, 35 Mo. App. 317. "What is the meaning of the words 'totally destroyed' when applied to a building? If the building was constructed of brick or other noncombustible material, fire could not destroy that. Therefore, the brick or other material not destroyed would have some value which the party retaining should pay for. From the nature of the case, therefore, the words referred to do not mean the debris from a building destroyed. This may have some value, and, if so, the insurance company, if it pays the loss, is entitled to compensation therefor. The words, when applied to a building, mean totally destroyed as a building; that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding, and must be torn down, and a new building erected throughout": *German Ins. Co. v. Eddy*, 36 Neb. 461, 466.

In all of the cases coming within our observation other than the principal case either the court or the jury had determined that the loss or destruction was total or complete. As already suggested, the question is often one of fact for the determination of the jury, and its verdict will not be set aside, unless influenced by incorrect instructions or manifestly against the weight of the evidence: *Corbett v. Springgarden Ins. Co.*, 85 Hun, 250. In the principal case, however, the facts were probably such as to have justified a finding that the loss had not been a total one. The defendant offered to prove by experts what would be the cost of repairing and restoring the building to its original usefulness, strength, and utility, and that such cost bore so slight a proportion to the value of the building when repaired as to amply justify such repairs. For the exclusion of evi-

dence of this character the judgment of the trial court was reversed, and the court, after fully considering the authorities upon the subject, formulated the following test, which seems to us to be the most practical and well-considered that has been advanced in any of the opinions. It is as follows: "We are of opinion that there can be no total loss of a building so long as the rest of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury; that whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as that in question was before the injury, would, in proceeding to restore the building to its original condition, utilize such remnant as such basis; that upon such issue the character of evidence offered and rejected in the case is competent; that our statute providing that 'a fire insurance policy in case of a total loss by fire of property insured shall be held and considered to be a liquidated demand against the company for the full amount of such policy, provided that the provisions of the article shall not apply to personal property,' does not affect the character of evidence admissible on the issue as to whether the loss is total, but merely affects the rights of the parties in case of total loss": *Royal Ins. Co. v. McIntyre*, 90 Tex. 170; ante, p. 797.

The right to repair a building or other structure which has been partially destroyed by fire may be rendered impossible of exercise either by the fact that the condition of the building before its destruction was imperfect, so that after it has received further damage from the fire it cannot safely be repaired, or there may be some municipal ordinance or other law existing at the time when the insurance was effected, as well as at the time when the loss was suffered, forbidding the repairing of the property. The question then arises whether either of these conditions of affairs will justify a court in declaring the loss to be total or the property to be wholly destroyed. The few cases which have arisen involving this subject have resulted in favor of the assured and affirmed his right to recover. In Louisiana, a building which was old and out of condition at the time it was insured afterward was damaged by a fire, leaving much of the building undestroyed, but, nevertheless, in such a condition that it could not be repaired so as to furnish a safe building. The court said: "Irrespective of all considerations of the public safety, is not the assured entitled, under any consideration of the policy, to some other and better indemnity for a loss by fire than the costs by repairs on the building that cannot be made safe by any repairs? A total loss may be claimed though the walls of a building stand, and the elements that composed it are not entirely consumed. It is the same, we think, when the insured building cannot be made safe by repairs. Nor will it make any difference in such cases of constructive total loss that the condition after the fire is due in part to causes arising before. Such causes are deemed the remote, not the proximate, cause of the loss. The insurer taking a risk on an old, and in this instance an insecure, building incurs the obligation to pay for a total loss, if the injuries by fire, combined with antecedent defects,

make repairs impracticable": *Monteleone v. Insurance Co.*, 47 La. Ann. 1563.

In England, an insurer of a building against loss from damage by fire reserved to himself the right of reinstating the property, instead of paying the amount of damages. After a fire, the commissioners of sewers, acting under the metropolitan building act, caused the remaining building to be taken down as in a dangerous condition, and would not permit its reinstatement. The insurance company pleaded these facts as a defense in an action brought against it. The plea was, however, overruled, for the reason that, having undertaken either to reinstate the building or to pay the amount of the damages, the insurer could not defend upon the ground that he was unable to reinstate because of the act of the commissioners of sewers and their refusal to permit the repairing of the building: *Brown v. Royal Ins. Co.*, 1 El. & El. 853. Questions somewhat similar have arisen in this country where wooden buildings have been insured which were within the fire limits of a municipal corporation, an ordinance of which forbade the repairing or reconstructing of such buildings. When a loss had been incurred from the peril insured against to such an extent that the repairing or reconstructing could not proceed without a violation of the ordinance, it was held that such ordinance must be regarded as a part of the contract of insurance, because it was an existing law at the time when the insurance was effected and applicable to the property insured, and, therefore, that the assured must be deemed as having suffered a total loss of the property insured, and entitled to recover, though doubtless the insurer would be entitled to have considered, as in mitigation of damages, the actual value of what remained of the building after taking into consideration the fact that it could not be repaired and that the materials thereof must be taken down and removed: *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Hamburg etc. Ins. Co. v. Garlington*, 66 Tex. 103; 59 Am. Rep. 613.

INSURANCE—MARINE—TOTAL LOSS—WHAT IS.—It seems that the proper rule to ascertain whether there has been a total loss of a vessel is to determine whether the injury is to more than half the value of the vessel when repaired. Such an injury is a total loss: *Dickey v. American Ins. Co.*, 3 Wend. 658; 20 Am. Dec. 763. See *Abbott v. Sebor*, 3 Johns. 39; 2 Am. Dec. 139; *Aranzamendi v. Louisiana Ins. Co.*, 2 La. 432; 22 Am. Dec. 136, and note.

DANIEL v. MASON.

[90 TEXAS, 240.]

MARRIED WOMAN, ESTOPPEL AGAINST.—The execution and delivery of a conveyance as a feme sole by a married woman to a person having no knowledge of her coverture, and her receiving and retaining the purchase price, cannot estop her nor her heirs from urging that she was married at the execution of such conveyance, and that it is void because her husband did not join therein.

A BONA FIDE PURCHASER FROM A MARRIED WOMAN having no knowledge of her coverture and her consequent inability to convey without her husband joining with her is not protected either as against her or her heirs; and she and they may therefore recover of such purchaser or his successor in interest the property so conveyed, though the purchase price was paid to, and retained by, her, and there is no offer to restore it to the purchaser.

Sidney L. Samuels, for the plaintiffs in error.

Seth W. Stewart, for the defendant in error.

242 DENMAN, A. J. It appears from the findings of fact by the trial court in this cause that James Coffey, common source of title, on the eleventh day of November, 1881, conveyed to Nora Daniels, the then wife of Thomas J. Daniels, the land in controversy, situated in Tarrant county, Texas, the deed reciting a consideration paid of five hundred dollars, with no word or expression therein indicating that the same was conveyed to her as her separate estate; that Nora Daniels, on the second day of August, 1882, conveyed said land by general warranty deed to John T. Mason, who paid a valuable consideration therefor, said Mason purchasing in good faith, believing that Nora Daniels had a right to convey said land, said deed being acknowledged in the ordinary form required by statutes of Texas for a single person or feme sole, there being nothing in the deed to indicate whether Nora Daniels was single or married, beyond the fact that the acknowledgment was as above indicated and her husband did not join her in its execution; that said Mason, in consideration of nine hundred and fifty dollars, on the thirteenth day of May, 1884, executed and delivered to Rowena M. Mason a general warranty deed for said land, which consideration was then paid in good faith by said Rowena M. Mason without notice of the fact of coverture of said Nora Daniels; that Nora Daniels died in 1892, **243** leaving her said husband and following children, to wit, Nora, Thomas, and Marie Daniels, surviving her; that each of the deeds aforesaid was, immediately after execution, duly recorded in the county where the land was situated; that there was no evidence of any deception or misrepresentation on the part of Nora Daniels in executing said deed, other than such as might

be deduced from the fact of its execution and delivery through a third person to whom the money was paid, neither her immediate nor any subsequent grantee having ever had any communication with her upon the subject.

This suit was brought by said Rowena M. Mason against the said husband and children of Nora Daniels to remove the cloud supposed to be cast upon plaintiff's title by the assertion of a claim to said land through said deed to Nora Daniels upon the supposition that the deed executed by her did not divest her of title. Said husband and children answered by plea of not guilty, and also by a special plea setting up title in themselves under said deed to Nora Daniels, and asking that the cloud cast upon their title by the assertion of claim thereto by Rowena M. Mason be removed, and that their title be decreed perfect.

Upon a trial before the court without a jury upon the facts above stated, the court found the following conclusions of law:

"1. I find that by executing the deed to John T. Mason and allowing and permitting James Coffey to deliver same, and it following as a natural consequence that the same would be placed of record, and thus making an apparently clear title upon the record, that the said Nora Daniels was guilty of such fraud as will estop her and those in privity with her from asserting any right, claim, or title to the property in controversy, especially as against the second vendee, the plaintiff herein, who had no notice of the coverture of the said Nora Daniels and no knowledge of any fact that would demand an inquiry as to such coverture.

"2. I find that the said Rowena Mason, being unaffected by actual notice of the coverture of Nora Daniels or of any fact that would put her upon inquiry as to the truth of said Nora Daniels' disability, and having paid value for the land, had a right to rely upon the record as to the condition of the title of the property she was purchasing, and the right to assume that the said Nora Daniels was sui juris and competent to contract; and, in consequence, the said Rowena Mason is an innocent purchaser and entitled to protection as such.

"3. I accordingly find that the plaintiff should be given judgment to remove the cloud from title to the property, as prayed for in her petition."

In accordance with these findings, the trial court rendered judgment for plaintiff Rowena Mason, from which judgment said defendants appealed to the court of civil appeals, assigning as error the action of the trial court in finding each of said conclusions of law, whereupon the court of civil appeals affirmed the judgment of the trial court, adopting the second conclusion of

law found by the trial court as above stated. From ²⁴⁴ which judgment of affirmance plaintiffs in error have brought the case to this court by writ of error, assigning as error, among other things, the action of the court of civil appeals in holding that the trial court did not err in finding each of said conclusions of law.

We are of opinion that the trial court erred in its first conclusion of law, to the effect that the heirs of Nora Daniels were estopped. She did nothing more than execute and deliver the deed, and probably receive the purchase money.

If the mere execution of a deed and receipt of the purchase money constitute an estoppel, then in all cases, though a married woman has no capacity to convey by deed wherein she is not joined by her husband, nevertheless the deed and its subsequent recording by the purchaser would pass the title by estoppel. Thus the attempt to make a conveyance which she has no legal capacity to make would, of itself, be held sufficient to estop her and her heirs from denying its binding force. This would virtually remove the disability of coverture. Such a rule has never been recognized in this state: *McLaren v. Jones*, 89 Tex. 131. We are of opinion that the court of civil appeals erred in not holding that the trial court erred in its said conclusion of law.

The court of civil appeals, however, affirmed the judgment as a result of its approval of the trial court's second finding of law above set out, and cite as authority the following cases: *Hill v. Moore*, 62 Tex. 610; *Edwards v. Brown*, 68 Tex. 329; *Patty v. Middleton*, 82 Tex. 586, and cases cited; *Hensley v. Lewis*, 82 Tex. 595; *Key v. La Pice*, 88 Tex. 209. These cases hold that where the legal title is in one and the equitable title is wholly or in part in another, a bona fide purchaser of such legal title from the holder thereof, for value, without notice of such undisclosed equity, will take free of same. In other words, the doctrine of these cases protects a bona fide purchaser for value, from the holder of the legal title with capacity to contract, against the undisclosed equity of another in the thing conveyed. As said by Associate Justice Stayton in *Hill v. Moore*, 62 Tex. 610: "It is a well-recognized doctrine in equity that a bona fide purchaser of the legal title to property, who pays a valuable consideration therefor, without notice, actual or constructive, of the right of other persons, is entitled to protection against others who may have equitable title or interest in the thing purchased; and it matters not whether the thing purchased be real or personal property."

An entirely different proposition, however, is advanced by the trial court's second conclusion of law above set out as having been approved by the court of civil appeals as the basis for the affirmance of the judgment. The proposition is, that a bona fide purchaser for value, from the holder of the legal title with no capacity to contract, will be protected against the subsequent claims of such vendor or his heirs seeking to avoid the binding force of such contract by reason of such want of capacity, on the ground that such purchaser had no notice of such want of capacity. We know of no instance in which such protection has ever²⁴⁵ been extended. Even under the rules of the law merchant, which manifest so much solicitude for the protection of a bona fide holder for value of negotiable paper, such protection is not afforded. In Daniel on Negotiable Instruments, third edition, sections 806, 807, it is said: "There are some defenses which are as available against a bona fide holder for value, and without notice, as against any other party. . . . Thus, if the maker of the note were an infant, a married woman, a lunatic, or a person under guardianship, the signature would impart no validity to it, and the bona fide holder could not recover against him, or her, however ignorant of the incapacity when he took the paper."

In the case before us the legal title was in Nora Daniels; but during coverture, in the absence of special circumstances not shown to have existed, she was without capacity to convey, whether the land be considered community or her separate estate; and the rules of equity, established for the protection of bona fide purchasers against secret or undisclosed equities, in the thing conveyed, afford purchasers from her and those claiming under them no protection against the consequences of such want of capacity though they were ignorant thereof. We are, therefore, of opinion that the court of civil appeals erred in approving said conclusion of law and affirming the judgment of the trial court.

For the errors indicated, the judgments of the trial court and court of civil appeals will be reversed and the cause remanded.

MARRIED WOMEN—ESTOPPEL BY CONVEYANCE.—Any conveyance made by a married woman in which the statute is not strictly complied with is void as to her and cannot bind her by estoppel: Monographic note to Trimble v. State, 57 Am. St. Rep. 170, on estoppel against married women. See Louisville etc. Ry. Co. v. Stephens, 96 Ky. 401; 49 Am. St. Rep. 303, and note.

MARRIED WOMEN—BONA FIDE PURCHASERS FROM—RIGHTS OF.—A married woman cannot profit by her own fraud to the prejudice of a bona fide purchaser from her. Therefore, if she has received and invested the proceeds of a sale of her lands to him

conveying an imperfect title, by purchasing other lands for her own use and benefit, she is estopped from dispossessing him except upon refunding the purchase money and paying for such necessary improvements as may have been made in good faith: *McDanell v. Landrum*, 87 Ky. 404; 12 Am. St. Rep. 500, and note. But see *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593, and note. If a married woman refuses to comply with her contract to convey land, it may be subjected to the payment of the amount of the purchase price paid by the purchaser: *Newman v. Moore*, 94 Ky. 147; 42 Am. St. Rep. 343, and note.

HALE v. HOLLON.

[90 TEXAS, 427.]

A NAKED POSSIBILITY OR THE EXPECTANCY OF AN HEIR to an ancestor's estate, or even an anticipated right of a person as next of kin, may be the subject of a contract in equity, which will be equivalent to an assignment of the property, if and when it shall fall into his possession.

A CONVEYANCE BY AN HEIR OF HIS EXPECTANCY in the estate of his ancestor or next of kin is valid as against his creditors.

AN ASSIGNMENT BY AN HEIR OF HIS EXPECTANCY in the estate of his ancestor was, by the common law, deemed a fraud upon the latter, and the assignee was required to rebut this presumption of fraud, which he might do by proving that the assignment was made without the consent of such ancestor and was free from fraud, unfairness, or inadequacy of consideration.

EXPECTANCY IN ESTATE OF INSANE ANCESTOR.—The fact that an ancestor was insane and did not, and could not, consent to an assignment by an heir of his expectancy in the estate of such ancestor is not fatal to the assignment, and it will be sustained if otherwise fair and free from objectionable features.

A. C. Prendergast, R. W. Anderson, and Hale & Hale, for the plaintiff in error.

Clark & Bolinger, for the defendant in error.

428 DENMAN, A. J. S. E. Hollon, who was all her life non compos mentis, died October 15, 1894, at the age of about sixty-eight years the owner of valuable real estate situated in McLennan and other counties in Texas, which she had inherited some years before, leaving as her heirs her brothers, D. P. Hollon and W. R. Hollon, and the children of a deceased sister, said D. P. Hollon having been her guardian for some years. Prior to the twenty-fifth day of June, 1894, various judgments were rendered against D. P. Hollon, and on that date he executed to his brother, W. R. Hollon, a conveyance of his "entire interest in the estate of S. E. **429** Hollon, of whatsoever kind and nature she is now in possession of or may hereafter become possessed of," which conveyance

contained a general warranty of title and was duly filed for record in McLennan county on the day of its execution. A few days after the death of S. E. Hollon, executions issued upon said judgments were levied upon an undivided one-third interest in the lands owned by S. E. Hollon at the date of her death as the property of D. P. Hollon, and at the sales under said executions the same was purchased by plaintiff in error, V. W. Hale.

On the tenth day of January, 1895, said Hale brought this suit against D. P. and W. R. Hollon, and, in addition to the facts above stated, alleged that said transfer from D. P. to W. R. Hollon was executed for the purpose of hindering, delaying, and defrauding the creditors of D. P. Hollon, who was then insolvent, and for the purpose of defrauding the said S. E. Hollon, the same being made without her knowledge or consent, all of which was well known to W. R. Hollon; wherefore he prayed for a cancellation of said instrument as being a cloud upon his title, acquired as purchaser at the execution sales aforesaid. W. R. and D. P. Hollon answered by general denial, and W. R. Hollon answered specially, denying all knowledge of insolvency of D. P. Hollon or of any fraud or intent to hinder or delay creditors in the execution of said instrument, alleging that he purchased the interest of D. P. Hollon in the estate of their sister, S. E. Hollon, in good faith, paying value therefor, and prayed for a cancellation of plaintiff's deeds as a cloud upon his title thereto.

On trial before the court without a jury, judgment was rendered that plaintiff take nothing by his suit, and that the deeds from the sheriff to plaintiff be canceled as a cloud upon the title of defendant, W. R. Hollon. The trial judge filed no conclusions of fact or law. The court of civil appeals, in affirming the judgment, upon conflicting testimony, find as a fact "that the transfer (from D. P. to W. R. Hollon above mentioned) was not made with intent to defraud creditors of D. P. Holland."

It is assigned as error here that the court of civil appeals erred in holding that D. P. Hollon could, as against his judgment creditors, make a valid conveyance of a naked expectancy without the knowledge or consent of S. E. Hollon.

The first question involved in the assignment is, Could D. P. Hollon contract with reference to the mere expectancy of inheritance from his sister in such way that by virtue of such contract any property he might inherit from her would pass to W. R. Hollon? Whatever may be the rule at law it is well settled as stated in Spence's Equity Jurisdiction, volume 2, page 865, that "a naked possibility or expectancy of an heir to his ancestor's estate, or even of the anticipated rights of a person as next of kin,

may be the subject of contract in equity, which will be equivalent to an assignment of the property if and when it shall fall into possession": *Nimmo v. Davis*, 7 Tex. 26; *Richardson v. Washington*, 88 Tex. 339; *Tailby v. Official Receiver*, L. R. 13 App. Cas. 523; *Mastin v. Marlow*, 65 N. C. 695; *Jenkins v. Stetson*, 9 Allen, 128; *Fritz's Appeal*, 160 Pa. St. 156.

⁴³⁰ The second question involved in the assignment is, Conceding that D. P. Hollon could bind himself by such a conveyance, was same binding upon his judgment creditors? If it be admitted that creditors, in the absence of contract, have any legal or equitable right to look to such expectancies for satisfaction of their claims, and therefore have the right to insist that the debtor do not dispose of same with intent to defraud them, upon which question we do not deem it necessary to express an opinion, still, the court of civil appeals, in support of the judgment of the trial court, having found as a fact that the conveyance was not made with intent to defraud creditors, such finding is conclusive upon us, and we must therefore hold as a matter of law that the conveyance is as binding upon such creditors as upon the debtor D. P. Hollon: *Fritz's Appeal*, 160 Pa. St. 156; *Fitzgerald v. Vestal*, 4 Sneed, 258; *Read v. Mosby*, 87 Tenn. 759; *Stover v. Eycleshimer*, 3 Keyes, 620.

The third question involved in the assignment is, Conceding that such an expectancy is a subject matter of contract in equity, and that there was no actual fraud in the execution of the instrument from D. P. to W. R. Hollon as above indicated, does the mere fact that S. E. Hollon did not assent thereto, she being without capacity to assent, prevent its having any binding force or efficacy? The doctrine of *McClure v. Raben*, 133 Ind. 507, 36 Am. St. Rep. 558, answers this question in the affirmative, and that of *Mastin v. Marlow*, 65 N. C. 695, in the negative. We have been able to find no other direct authority. Doubt as to how this question should be answered was the ground upon which we granted the application for writ of error. The rules permitting and regulating dealings by expectants with reference to such expectancies, being of common-law origin, were adopted by us along with the body of that law by act of Congress of the republic of Texas, approved January 20, 1840, which provided "that the common law of England (so far as it is not inconsistent with the constitution or the acts of Congress now in force) shall, together with such acts, be the rule of decision in this republic, and shall continue in full force until altered or repealed by Congress." The inquiry then naturally presents itself, What was the common-law rule as recognized in the courts of England at that time upon

the question under consideration? For since there has been no statute or direct decision in this state in reference thereto, it would seem that such rule should be entitled to much respect at this late day as being the probable basis of many titles to land.

While the courts of equity in England have long recognized and enforced contracts by expectants in reference to such expectancies, they have from the earliest period viewed them with great suspicion. This arose: 1. From the fact that such expectants, being often young, inexperienced, hard pressed, or of extravagant habits, are inclined to sacrifice their future interests to meet their present real or imaginary wants, thus rendering them easy victims of the schemes of that cunning and pernicious element who too often mark them as their prey; and 2. ⁴³¹ From the fact that such transactions are looked upon as a species of fraud upon the ancestor or person from whom the expectancy is to be received in that they, being usually of a secret nature, tend to destroy or lessen his influence and control over the expectant by giving him independent means of gratifying his desires, and in that the ancestor would often be thereby deluded into virtually leaving his property, not to the persons intended, but to the stranger who had so insidiously undermined his domestic authority and encompassed the ruin of the intended beneficiary of his fortune. Therefore, as early as the leading case of *Chesterfield v. Janssen*, 2 Ves. 158. 1 Atk. 339, decided in 1750, we find the doctrine firmly established in said courts that whether the suit be by the holder of the contract to enforce specific performance or by the expectant to be relieved from the terms thereof, the prima facie presumption was that the same was a fraud both upon the expectant and the ancestor or party from whom the expectancy was to be derived, and therefore the burden was imposed upon the holder to rebut such presumption in order in one case to obtain the relief prayed for by him or in the other to defeat that sought by the expectant. We are not called upon in this case to determine the character of proof the holder was required to produce in order to rebut such presumption, except as to whether it was necessary to show the consent of the ancestor or person from whom the expectancy was to be derived. Doubtless, the absence of such assent, where the whole evidence did not clearly show a fair and just transaction, was considered by the courts as most cogent evidence of fraud entitling the expectant to relief, but we have been able to find no English case where its mere absence has been held to authorize such relief, if the proof offered showed a transaction otherwise free from fraud, unfair-

ness, and inadequacy of consideration. Indeed, most of the cases seem to proceed upon the assumption that there was no such assent; so much so that Lord Brougham erroneously considered that no relief could be granted against the contract if it were present: *Earl of Aylesford v. Morris*, L. R. 8 Ch. 491. In *Beckley v. Newland*, 2 P. Wms. 182, decided in 1723, Beckley and Newland having married sisters who were cousins and presumptive heirs of Mr. Sturgis, a very wealthy man who had made and revoked several wills, entered into an agreement whereby they agreed to divide equally all property which Mr. Sturgis might give to either of them by last will. Subsequently, Mr. Sturgis made a will leaving to Newland the greater portion of his property, and after the death of Mr. Sturgis Beckley filed his bill to enforce the specific performance of the agreement for an equal division. It was objected by Newland that the agreement ought not to be enforced because it tended to defeat the purpose of the testator, who in all probability would have given nothing to either of the parties to the agreement in case he could have foreseen that his disposition was to be thus frustrated. Lord Chancellor Macclesfield, however, enforced the agreement, holding that it could not be unreasonable to agree to divide the property according to what would have been the course of descent in case ⁴³² Mr. Sturgis had died intestate. In this case there was clearly a concealment of the agreement from Mr. Sturgis, and its purpose and effect were to encompass the defeat of his will, and pass the property in a different way from that intended by him, and to render the contracting parties more independent of his wishes than they otherwise would have been, yet the learned chancellor, considering upon the whole case that the agreement was not inequitable, enforced its performance notwithstanding the concealment from and want of assent of Mr. Sturgis. In *Chesterfield v. Janssen*, 2 Ves. 158, 1 Atk. 339, though the agreement contemplated that the transaction should be kept secret from the Duchess of Marlborough, Justice Burnett, though declining to decide whether, under all the circumstances, the agreement should have been relieved against if it had not been subsequently confirmed by the expectant, said: "It may be thought too rigid to say that an heir shall not borrow upon an expectancy; as some persons are so niggardly and sparing to their children, that a poor heir may starve in the desert, with the land of Canaan in his view, if he could not relieve himself this way"; and Lord Hardwicke, after delivering a dictum which has ever since been referred to as the most lucid exposition of the law relating to such contracts to be found in the books, proceeded to dispose of the

case by holding that the bond was not void at law, but, at most, merely voidable in equity, and therefore, since the expectant had ratified it after the death of the duchess, no relief could be had. In *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484, decided in 1871, the expectant applied for relief from a most unconscionable bargain, which had been carefully concealed from his father. Lord Chancellor Selborne, in passing upon the case, said: "In the cases of catching bargains of the expectant heirs, one peculiar feature has been almost universally present, . . . the victim comes to the snare . . . excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy; he comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants. Whatever there may be in any such collateral considerations, they could hardly prevail if they did not connect themselves with an equity more strictly and directly personal to the plaintiff in each particular case." After thus disposing of the fact of nonassent of the ancestor as being insufficient of itself to authorize relief, ⁴²⁸ he proceeded to show that the circumstances attending the transaction, including the concealment from the father, and the unconscionableness of the bargain, were such as to bring the case within the rule, and thereupon entered a decree in the usual form in such cases granting relief against the terms of the contract, if the expectant, within a given time, should repay defendant the money advanced, with lawful interest, in default of which his bill should be dismissed. Thus it seems clear that, while courts of equity in England have always considered concealment from, or nonassent of, the ancestor as cogent evidence of fraud, when connected "with an equity more strictly and directly personal to the plaintiff in each particular case," they have never deemed it sufficient of itself to authorize relief against the contract, where the person dealing with the expectant has shown, in rebuttal of the presumption above

discussed, that the transaction was otherwise free from fraud, unfairness, and inadequacy of consideration; and it is important to note, as said by Lord Selborne in the opinion above cited, "fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions." They appear to have proceeded upon the logical idea that, having recognized the right of an expectant to contract with reference to such expectancies, such contract, when shown under the strict scrutiny of a court of equity to be otherwise unobjectionable, cannot be set aside for mere want of the assent of one not a party thereto.

Having ascertained as best we could the rule recognized in England at and since the enactment of our statute adopting the common law, we will examine the cases asserting a contrary doctrine in this country. In *Boynton v. Hubbard*, 7 Mass. 112, decided in 1810, it was held, as we understand the opinion by Parsons, C. J., that a contract by an expectant to convey a portion of his expectancy, though free from fraud as between the contracting parties, is void when made without the assent of the ancestor, on the sole ground that it is a fraud upon such ancestor, productive of public mischief, and against sound public policy. The opinion seems to confuse the powers and jurisdictions of courts of law and equity, and is difficult to understand. It is severely criticised by the editor in his notes to said report, wherein he maintains that, the proceeding being one at law, the contract was erroneously held void, as it "was undoubtedly good at the common law, and voidable only in a court of equity." The opinion is not sustained by the cases cited therein. Though the learned chief justice said, in the course of his opinion, that the fairness of the transaction had been settled by the verdict, the reported facts show that the bargain was a most unconscionable one, and it may be that opinion was influenced more by that fact than the report of the case would indicate. We do not find any case in that state involving the precise question whether a contract otherwise fair and equitable, as between the parties, was void merely for want of the assent of the ancestor. This case is dissented from in an opinion rendered by the supreme court of North Carolina in 1859, ⁴²⁴ wherein such a contract was upheld, the court through Battle, J., saying: "It is true that the policy of giving effect to contracts of this kind against expectant heirs has been doubted by very eminent judges; and C. J. Parsons, in *Boynton v. Hubbard*, 7 Mass. 112, refused to sanction an assignment made by a nephew in the lifetime of his uncle, of his expectant interest in that uncle's estate. But the doctrine is now too well estab-

lished to be disregarded, and the authorities to which they refer fully sustain White and Tudor in saying that 'a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled, under an appointment or in personal estate as presumptive next of kin of a person then living, is assignable in equity for a valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced': McDonald v. McDonald, 5 Jones Eq. 211; 75 Am. Dec. 434. In Alves v. Schlesinger, 81 Ky. 290, which was a suit in equity decided in 1883, in a very brief opinion without discussion or citation of authorities, the doctrine is announced for the first time, as far as we have been able to discover from the reported cases, that an agreement entered into by a brother, for a valuable consideration, to convey to his sister all the right, title, and interest that he then had, or might thereafter acquire by gift, devise, or descent from his mother in certain lands, and whereby he agreed to execute and deliver to his sister all necessary and proper deeds to perfect the title when it could be done, or his interest in the property might be determined, the agreement being made at the instance of the mother, and without any fraud or unfairness as between the brother and sister, conferred no right whatever upon the sister, and could not be enforced for the reasons: 1. That the mother's assent was merely verbal, and she did not thereby deprive herself of any interest in the property in favor of the daughter; and 2. That the son, during the life of the mother, "had no right or interest therein, legal or equitable, vested or contingent. In fact, what he sold and undertook or agreed to convey had neither actual or potential existence." This being a proceeding in equity, it is difficult to understand by what process of reasoning the learned judge who delivered the opinion reached the conclusion, under the authorities, that the son could not in equity bind himself by contract to convey his expectancy to the sister, or that any more than a verbal assent from the mother could be necessary in any event. We have been able to find no decided case which supports this decision, and, as we have seen above, the settled law elsewhere is to the contrary. Even Boynton v. Hubbard, 7 Mass. 112, clearly would have been decided differently if the verbal assent of the uncle had been given. The effect of the decision was to ignore the son as a contracting party, and render it necessary for the mother, who was not a party to the contract, to have made such an agreement as would have bound her to carry out the contract between the son and daughter. In McClure v. Raben,

125 Ind. 139, 133 Ind. 507, 36 Am. St. Rep. 558, cited above, the court, relying ⁴³⁵ for authority upon *Boynton v. Hubbard*, 7 Mass. 112, *Alves v. Schlesinger*, 81 Ky. 290, and *Hart v. Gregg*, 32 Ohio St. 512, held, as above indicated in the beginning of the discussion of this question, that the assent of the ancestor was absolutely essential to the validity of the contract, and that the fact that she was non compos mentis, and therefore unable to assent, did not change the rule, and therefore held the deed made by the expectant void for want of such assent. The court say that the Ohio case is directly in point. We have examined that case, and are of opinion that it has no bearing whatever upon the question. There plaintiff, holding an ordinary deed without warranty from one Gordon to a tract of land, brought suit to recover the same against the party in possession, and it was shown on the trial that at the date of the deed the title was in the father of Gordon, and not in him, but that the father had died before the institution of the suit, leaving said grantor Gordon as his only heir; and the court held that the title inherited by the son from the father, after the execution of the deed, did not pass by estoppel to the plaintiff, for the reason that there was no warranty, nor was there any recital of any fact in the instrument which would estop the grantor from asserting an after-acquired title. It was not a case where the son had attempted to convey an interest which he might thereafter derive from his father by inheritance or otherwise. The above are all the authorities we have been able to find holding that the assent of the ancestor is necessary to the validity of a contract otherwise unobjectionable.

On the other hand, following the principles laid down in the English cases above discussed, such contracts have been upheld, when shown to be fair and equitable, though the assent of the ancestors did not appear, but, on the contrary, the inference from the circumstances stated is that the transactions were without their knowledge, in the following cases: *Fritz's Appeal*, 160 Pa. St. 156; *Stover v. Eycleshimer*, 3 Keyes, 620; *Steele v. Frier-son*, 85 Tenn. 430; *McDonald v. McDonald*, 5 Jones Eq. 211; 75 Am. Dec. 434. It is true that in none of these cases does it appear that any contention was made that the absence of the assent of the ancestor invalidated the contract, but in the last case cited from North Carolina it is clear that the question was squarely before the court from the fact that, as above indicated, the opinion of Chief Justice Parsons in *Boynton v. Hubbard*, 7 Mass. 112, where that was the sole question, was disapproved. In *Mastin v. Marlow*, 65 N. C. 695, referred to in the beginning

of this discussion, the facts of the case appear to be of the same character as those in *McClure v. Raben*, 125 Ind. 139; 133 Ind. 507; 36 Am. St. Rep. 558. The bill for specific performance alleged that the ancestor was non compos mentis at the time two of his children executed the instrument sought to be enforced, so that it is clear that the court had before it the fact that there was no assent on the part of the ancestor, but still it was held, referring to *McDonald v. McDonald*, 5 Jones Eq. 211, 75 Am. Dec. 434, that the suit was improperly dismissed for want of equity in the bill, the court saying: "The power of an heir expectant to bind himself by contract, in regard to what may ~~and~~ descend to him by the death of the ancestor, is taken to be settled. In some cases, when the consideration is fair and adequate, and no undue advantage has been taken, the decree is for specific performance. In other cases, when advantage has been taken of the necessity of the party, the contract is held as a security for the return of the money actually advanced, together with interest, while in other cases, all relief is refused, because of fraud and imposition. Under which of these three classes the case in hand will fall it is not for us now to say, as the plaintiffs will no doubt ask the privilege of amending the bill, so as to make the allegation in respect to the price paid, and the fairness of the transaction more distinct and direct."

While, as before stated, there has been no direct decision in this state upon the question, we do not feel at liberty to leave unnoticed the remark of Justice Wheeler, in *Nimmo v. Davis*, 7 Tex. 26, which was a case upholding a voluntary partition of property made by the life tenant and remaindermen during the life of the former. In course of the opinion rendered in 1851, that learned jurist, after referring to the right to contract with reference to expectant or future interests as settled law, said: "There is, however, this restriction upon the dispositions of heirs dealing with their expectancies, and reversioners and remaindermen dealing with property already vested in them; that it is incumbent on the party dealing with them 'to make good the bargain'—that is, to show that the dealing is fair, and for an adequate consideration." When analyzed, this will be found to be probably the clearest, most concise, and at the same time the most comprehensive, statement of the rule, as applied in the courts of equity in England, to be found in the books, but it does not agree in all respects with some of the decisions in this country. It places "heirs dealing with their expectancies" upon the same footing with "reversioners and remaindermen dealing with property already vested in them," as has always been the

case in England (*Earl of Aylesford v. Morris*, L. R. 8 Ch. 497), but not in some of the courts of this country. It imposes the burden of proof on the holder of the contract "to make good the bargain," quoting the favorite expression of the English judges. It interprets the quotation to mean just what has always been its construction in England, that is, that the purchaser must show not only that the "dealing is fair," but also that he paid an "adequate consideration," the rule being well settled in England that the purchaser, in order "to make good the bargain," must not only show that he perpetrated no actual fraud, but that he did not make an inequitable deal, the courts being so strict on this question as to adequacy of consideration that an act of parliament was finally passed to relieve against its supposed harshness in certain cases: *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484. It does not, in mentioning the restrictions thrown around such transactions by law, follow Chief Justice Parker, with whose opinion in so noted a case, rendered forty years before we must assume the court was familiar, in going beyond the rule as then long well established in England by requiring, in ⁴³⁷ addition, the assent of the ancestor. In view of the long-established rule in England, at the date of our statute adopting the common law, holding such transactions valid in the absence of the assent of the ancestor, when shown to be otherwise unobjectionable, under the strict scrutiny of a court of equity, notwithstanding the presumption of fraud indulged against them, and merely voidable when not so shown, taken in connection with the early, and to this date unchallenged, remarks of Justice Wheeler above quoted, a court should long hesitate now before adopting the rule laid down by Chief Justice Parsons in *Boynton v. Hubbard*, 7 Mass. 112, holding absolutely void, as contrary to public policy, solely on account of the nonassent of the ancestor, every such transaction had in this state since 1840, no matter how just and fair in other respects. Though we do not feel called upon by the facts of the case before us to determine whether the transfer in this case would have been valid had S. E. Hollon been sane, we have deemed it necessary to say this much in order to prevent our disposition of this case, upon what might otherwise be considered an exception to the rule laid down in *Boynton v. Hubbard*, 7 Mass. 112, from being taken as an approval of such rule.

The transaction between D. P. and W. R. Hollon having been found by the court of civil appeals, in face of the presumption of fraud indulged in such cases, to have been free from same, it could not even have been held voidable as a matter of law under the English rule, merely for want of the assent of S. E. Hollon,

and we are of the opinion that, even under the rule of *Boynton v. Hubbard*, 7 Mass. 112, the want of her assent, she being non compos mentis, would not render it void. In such a case, the reason of the rule fails; for she having no capacity, either to exercise any influence or control over the expectant, or to change by will or otherwise the course of descent of her property, no moral or legal right of hers was invaded by the transaction between her brothers, and hence it could be no fraud upon her. Such a case, in our opinion, should be held an exception to, or, rather, not to be within the rule of *Boynton v. Hubbard*, 7 Mass. 112. We must therefore overrule the assignment of error above stated, and being of opinion that the court of civil appeals correctly disposed of the various other assignments, we deem it unnecessary to discuss them again here.

The judgment will therefore be affirmed.

EXPECTANCIES—ASSIGNMENT OF IN EQUITY.—The general current authority supports the proposition that, while an assignment, transfer, or other disposition of an expectancy of an inheritance is invalid at law, it may, when not contrary to public policy, be enforced in equity; and agreements for the sale, assignment, or release of such expectancies, if fairly made and for an adequate consideration, are enforceable in equity, upon the death of the ancestor: Monographic note to *McCall v. Hampton*, 56 Am. St. Rep. 344, on the assignment of expectancies.

EXPECTANCIES—ASSIGNMENT—ASSENT OF ANCESTOR—EFFECT OF HIS INSANITY.—A contract for the conveyance of an expectant interest in an ancestor's estate cannot be enforced until it is shown that there was neither fraud nor oppression, and that the ancestor had knowledge of and consented to such contract; and the fact that he was incapable of consenting because of his insanity does not constitute an exception to the rule requiring his assent: *McClure v. Raben*, 133 Ind. 507; 36 Am. St. Rep. 558, and note. See monographic note to *McCall v. Hampton*, 56 Am. St. Rep. 350.

CAPPS v. LEACHMAN.

[90 TEXAS, 499.]

AN EXECUTION WHICH IN that part of it which commands the sheriff to seize goods and chattels omits the name of the person whose property is so directed to be seized is void, though it appears from the whole writ against whom the judgment was rendered, and there can, therefore, be no reasonable doubt whose property should be taken to satisfy it. The sale of the chattels of the defendant proposed to be made under such execution may, therefore, be enjoined.

Harris & Knight, for the appellant.

John Bookhout, for the appellee.

⁵⁰⁰ BROWN, A. J. The court of civil appeals for the fourth supreme judicial district has certified to this court the following statement and question:

"George S. Leachman applied to the judge of the 44th judicial district of Texas, in and for Dallas county, for a writ of injunction to restrain the sale of certain real and personal property belonging to said Leachman, which was to take place by virtue of an execution issued out of the district court of Tarrant county, under a judgment in favor of Capps and Cantey and against said Leachman. In the petition it was alleged that the execution was void because, on its face, it showed that it was a third execution issued upon said judgment and it is not shown what disposition was made of the other executions, or what the returns were thereon, or that the same were returned unsatisfied, and further said execution does not show out of whose goods, chattels, lands, and tenements the said sheriff is commanded to make the money called in said judgment, only commanding the sheriff, 'That of the goods and chattels, lands and tenements of the said _____, you cause to be made the sum of nineteen hundred and twenty-nine dollars and ninety cents,' and does not show whose goods, chattels, lands and tenements are to be seized to satisfy the said judgment and does not sufficiently describe the judgment, or show whether it was rendered in 1893 or 1894, and does not contain an itemized bill of costs. It was further represented that the real estate levied on under the execution was the business homestead of Leachman.

"The following facts were in proof on the trial:

⁵⁰¹ "In the District Court, _____ Term, 189—.

"State of Texas, }
"County of Tarrant. } No. 7246.

"The State of Texas, to the Sheriff or any Constable of Dallas County, Greeting:

"Whereas, at the February term, 1894, of the Honorable District Court of Tarrant County, Texas, on the 27th day of February, 1894, Wm. Capps and S. B. Cantey, plaintiff, recovered judgment against G. S. Leachman, for the sum of nineteen hundred and twenty-nine and ninety one-hundredths dollars and all costs of suit, as of record is manifest in Minute Book 3, page 321, of the minutes of said court.

"This is the third execution issued in this case.

"Therefore, you are hereby commanded that of the goods and chattels, lands, and tenements of the said _____ you cause to be made the sum of nineteen hundred and twenty-nine dollars and ninety cents, with interest at the rate thereon of twelve per

cent per annum from the date of the rendition of said judgment until paid; and the further sum of eighteen dollars, costs of suit and the further cost of executing this writ."

"The execution did not show what disposition was made of the former executions, or what returns were made thereon, or that the same were returned unsatisfied. No bill of cost was attached to the execution; otherwise the indorsements were such as are required by law to be made.

"When the said execution was read in evidence it was agreed by and between the parties that it was by virtue of same that the defendants herein levied on the property in controversy, and that they had no right, interest, or title to the same, in any manner, except by virtue of such levy, and thereupon the court announced that in its judgment the execution was void, and the judgment would be rendered for the plaintiff as prayed for, without regard to any other issue in the case, and upon this understanding the case was submitted to the court without further evidence, the plaintiff offering to show that the property in controversy was also his homestead, but the court declined to hear any evidence on this issue, stating that it would not affect his decision, as in his judgment plaintiff was entitled to judgment because of the invalidity of the writ of execution."

Question: "Was the execution void for any of the reasons set forth in the petition?"

To the question, we answer, the execution in this case was void because it failed to name the person whose property was to be subjected to its satisfaction.

Article 2338 of the Revised Statutes, after prescribing the formal matters connected with the issuing of an execution, provides as follows: "It shall correctly describe the judgment, stating the court wherein and the ⁵⁰² time when rendered, the names of the parties, the amount, if it be for money, and the amount actually due thereon, if less than the original amount, the rate of interest, if other than six per cent, and shall have the following requisites: . . . 2. If the judgment be for money simply, it shall require the officer to satisfy the judgment out of the property of the debtor, subject to execution."

It will be observed that the foregoing article of the statute prescribes as a requisite to the execution that it shall require the officer to satisfy the judgment out of the property of the debtor, and it must have intended that the debtor's name should be given in the body of the writ. *Douglas v. Whiting*, 28 Ill. 362, cited by counsel for appellee, is the only case that we have been able to find bearing directly upon this question. In that

case, as in this, the execution omitted the name of the debtor whose property was to be seized, leaving a blank where the name should have occurred, and that court said: "It is indispensable, before one's property can be sold under a judgment against him, there should be an execution against the property of the judgment debtor. There has been none in this case; consequently the sale of the premises is null and void, and the sheriff's deed also."

There is in this state a line of decisions which we think sustain the answer we have given, although they cannot be said to be directly in point. We cite the following: *Cleveland v. Simpson*, 77 Tex. 96; *Morris v. Balkham*, 75 Tex. 111; 16 Am. St. Rep. 874; *McKay v. Paris etc. Bank*, 75 Tex. 181; 16 Am. St. Rep. 884. In the case of *Morris v. Balkham*, 75 Tex. 111, 16 Am. St. Rep. 874, cited above, there was a mistake in the given name of the debtor in the execution, and this court held that a sale made under it was a nullity and conferred no title. If such a mistake as occurred in that case would render an execution void, we think most assuredly the omission of the name of the debtor entirely would have that effect.

Appellant's counsel urge that the officer must have known from the execution, in the form it was issued, that the money was to be made out of the property of the defendant in the judgment as it could have been lawfully made out of the property of no other person. If the legislature had intended to commit to the sheriff or constable the authority to determine upon whose property he should levy the execution, then all that would be necessary to make a good execution would be to describe the judgment as required in the article quoted, and it was useless to express in the law that there should be other things added which were requisite to the validity of the writ. The statute in this particular is mandatory and explicit in its command, and a failure to comply with its terms cannot be classed as an irregularity.

EXECUTION—EFFECT OF CLERICAL ERRORS.—Mere clerical errors and failure to recite the judgment with strictness do not avoid the execution. If, from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued, and enforced as an execution upon the judgment shown to the court, the writ should be received and respected: *De Loach v. Robbins*, 102 Ala. 288; 48 Am. St. Rep. 46, and note. See *Gardner v. Mobile etc. R. R. Co.*, 102 Ala. 635; 48 Am. St. Rep. 84. The variance is immaterial and may be disregarded, if the execution conform substantially to the judgment: *Graham v. Price*, 3 A. K. Marsh. 522; 13 Am. Dec. 199, and extended note. The omission of the christian names of the plaintiffs in a judg-

ment does not render void an execution in which the names are fully stated: *Jennings v. Carter*, 2 Wend. 446; 20 Am. Dec. 635. See *Thompson v. Bondurant*, 15 Ala. 346; 50 Am. Dec. 136. A sale under an execution in which the defendant's christian name is improperly given is invalid. It is not supported by a judgment in which the name is properly given: *Morris v. Balkham*, 75 Tex. 111; 16 Am. St. Rep. 874.

SAN ANTONIO STREET RAILWAY COMPANY v. STATE.

[90 TEXAS, 520.]

MANDAMUS MAY ISSUE TO COMPEL A CORPORATION to perform a duty imposed by statute. Such duty may be prescribed by the express terms of the statute or charter, or, without being so expressed, may be implied as a fair implication therefrom.

CORPORATION, DUTY, WHEN NOT IMPOSED UPON BY GRANT OF A PRIVILEGE.--If by a statute, charter, or ordinance a corporation is granted the privilege of doing something, the duty of doing it is not thereby imposed so as to authorize the issuing of a writ of mandamus to compel the exercise of the privilege.

STREET RAILWAYS.--**MANDAMUS DOES NOT LIE TO ISSUE TO COMPEL A STREET RAILWAY** corporation to continue the operation of its lines as they have been constructed and operated, if the statute or ordinance granting it the right to construct and operate such lines purports to grant a privilege rather than impose a duty, and it is not material that the corporation accepted the privilege, and, for a time, exercised the franchise thereby granted. The only remedy is by a proceeding to forfeit the franchise.

Houston Brothers, for the plaintiff in error.

R. B. Minor, A. Lewy, and Clark, Summelin & Fuller, for the defendants in error.

523 GAINES, C. J. This case arose by a petition filed in the name of the state of Texas upon the relation of Henry Elmen-dorf and others to compel the plaintiff in error to operate a part of its lines, upon which it had ceased to run its cars. Demurrers to the petition were overruled, and exceptions to the answer of respondent were sustained, and thereupon the peremptory writ was awarded as prayed for in the petition. This judgment was affirmed upon appeal, and to the judgment of affirmance this writ of error has been granted.

The first question is: Did the facts alleged authorize the relief prayed for in the petition? It was alleged that the respondent company was a **523** corporation, chartered by a special act of the legislature passed May 2, 1874, and authorized to operate street railways in the city of San Antonio for the term of fifty years; that it applied to the city council of the city for authority to construct certain lines within the city limits and that the privilege was granted by an ordinance, which is copied in the

petition. So much of it as bears upon the questions presented reads as follows:

"Section 1. That the privilege be and is hereby granted to the San Antonio Street Railway Company to construct and operate a street railway, with all its necessary tracks, sidetracks, switches, turnouts, curves, turntables, etc., and that the rights, privileges, and franchises are hereby granted to the said railway company for and during the term of their charter, upon the following additional streets and avenues, to wit: Beginning at the end of its present tracks on West Commerce street, thence west over and along West Commerce street to Seventeenth street, thence north over and along Seventeenth street to Zavalla street, thence over and along Zavalla street into the property known as Lake View, thence north on West Nineteenth street to Woodbury avenue, thence along Woodbury avenue to West Belknap street, thence along West Belknap street to Highland Park. Also, from West Commerce street at its intersection with Zalzamoras street, south over and along Zalzamoras street to San Fernando street, thence east over and along San Fernando street to South Laredo street, thence north over and along South Laredo street to Dolorosa street. Also, upon and over Myrtle street from South Flores street to San Pedro avenue.

"Sec. 2. That said company may use in the construction and maintenance of said road what is known as 'T' rail.

"Sec. 3. That said company is hereby required to observe all existing ordinances of the city of San Antonio not inconsistent with the rights herein granted."

It is not expressly averred that at the time the ordinance was passed, the company had already constructed and had in operation a line or lines of street railway in the city; but we think that this is to be inferred from section 1, which speaks of the streets over which the privilege to construct and operate was thereby granted as "additional streets and avenues." It was further averred that the company had constructed and for a time had operated the line from its beginning point to Highland Park, but that while it had continued to operate that portion of that line nearest the city, it had abandoned the operation of a part. The prayer was for a writ of mandamus to compel the respondent to operate that entire line.

It is a well-settled doctrine that a corporation may be compelled by the writ of mandamus to perform a duty imposed by statute. The duty need not be express; it may be implied. Clearly, when it appears by fair implication from the terms of its charter, it is as imperative as if the obligation were expressed.

But as to corporations quasi-public in character, such for example as those chartered for the carriage of passengers ⁵²⁴ and freight, there are decisions which hold that they owe certain duties to the public which they may be compelled to perform, although not enjoined by their charters, either in express terms or by specific implication. But we have been unable to discover that any well-defined rule has been laid down by the authorities by which we may determine in every case what implied duties are assumed by such a corporation by the acceptance of its charter. It has been held that, in the absence of some direct statutory requirement, a railroad company cannot be compelled to establish and maintain a station at a particular point on its line, although it may be shown that the convenience of the public demands it. *Northern Pac. R. R. Co. v. Washington*, 142 U. S. 492; *People v. Railway*, 104 N. Y. 58; 58 Am. Rep. 484. A contrary doctrine seems to have been acted upon in *State v. Republican etc. R. R. Co.*, 17 Neb. 647, 52 Am. Rep. 424, and in *People v. Chicago etc. R. R. Co.*, 130 Ill. 175. It is one thing to hold that a company, which has accepted a charter authorizing it to construct a line of railroad, with power to condemn property, and has constructed and is maintaining its line, may be compelled to so operate its line as reasonably to meet the necessities of the public; and, as we think, it is quite a different one that a railroad company, by the acceptance of its charter, which simply makes it lawful to construct and maintain a railroad, assumes an obligation to construct it and to maintain its operation so long as its corporate existence may continue.

The latter question was presented in the case of *York etc. Ry. Co. v. The Queen*, 1 El. & B. 858. There the company had constructed its line in part only. The purpose of the suit was to compel it by the writ of mandamus to construct the entire road. In the court of queen's bench, there was a judgment for the relators—two of the judges concurring in opinion, and one dissenting. This judgment was reversed in the exchequer chamber by the unanimous opinion of the nine judges who sat upon the case. The chief justice, who delivered the opinion of the court upon the hearing of the writ of error, after stating the facts, propounded the question to be decided as follows: "Upon these facts several points arise: 1. Does the statute of 1849 cast upon the plaintiffs in error a duty to make this railway? 2. If it does not, is there under the circumstances a contract between the plaintiffs in error and the landowners which can be enforced by mandamus? 3. And, failing these propositions, does a work which in its inception is permissive only become obligatory by

part performance?" The second question does not concern us here. The charter in this case did not involve nor did it grant the taking of private property for the public use. After concluding that there was no language in the statute from which it could be inferred that it was the intention of parliament to make it obligatory upon the company by the acceptance of the charter to construct the entire line of railroad, the court in their opinion decide the first question as follows: "It seems to us, therefore, that these statutes do not cast upon the plaintiff in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only; and that there ~~is~~ is no reason in policy or otherwise why we should endeavor to pervert them from their natural meaning." Upon the third the court speak as follows: "There remains but one further view of the case to be considered; and of that we have partly disposed in the observations which we have already made. But inasmuch as Lord Campbell proceeded upon this ground only in the court below, although it was not much relied upon before us in argument, we have, out of respect to his high authority, most carefully examined it, and are of opinion that the mandamus cannot be supported upon the ground that the railway company, having exercised some of its powers, and made part of their line, are bound to make the whole railway authorized by their statutes." The opinion throughout bears the marks of the most careful consideration and is supported, as we think, by argument which cannot be satisfactorily answered.

The authorities upon the precise point are but few. But the question arose in the case of *State v. Southern Minnesota R. R. Co.*, 13 Minn. 40, and the writ of mandamus was refused because the statute which authorized the construction of the railroad neither in express terms nor by reasonable construction imposed upon the company the specific legal duty of constructing it. The general principle was also affirmed in the case of *Northern Pac. R. R. Co. v. Washington*, 142 U. S. 492. The attempt in that case was to compel a railroad to establish and maintain a station at a point where it was alleged the interest of the public required such station. But upon the point decided in that case the decisions are in conflict.

The case of *State v. Hartford etc. R. R. Co.*, 29 Conn. 538, presented a question very like that under consideration. In that case the company was chartered to run its line from its initial point to a point on the tide water. It constructed and for a while maintained its road to the tide water; but, having entered

into a contract for a connection with another company, it diverted its line a mile and a half from the water terminus and ceased to carry passengers to the latter point, though it continued to carry freight. The court held that it could be compelled by mandamus to carry both passengers and freight as required by its charter. But it was contended on behalf of the relators that its charter by its terms imposed the duty upon the company to construct and operate its entire line and especially forbid it to discontinue any part of its line that had been put in operation. On the other hand, counsel for the company maintained that the charter granted a privilege merely and did not impose a duty. The opinion upon the main question is very brief, and it is impossible to ascertain from it how the court determined the question of the construction of the charter so pointedly presented in the briefs. But, in discussing another question in the case, the court use this language: "What right have they to covenant with that corporation that they will not run cars to tide water as the charter provides they shall," etc; from which it may be inferred that they adopted the construction contended for by the counsel for the relators. ⁵²⁶ If the language of the charter is correctly quoted in the brief of counsel, as doubtless it was, we think that it impliedly made it the duty of the company to continue to operate so much of its line as it should once construct and operate, and that therefore the decision is not in conflict with the cases previously cited.

We have a similar difficulty with the case of Potwin Place v. Topeka Ry. Co., 51 Kan. 609; 37 Am. St. Rep. 312. That was an action to compel a street railway company to operate a portion of its line which it had discontinued. The court may have intended to hold broadly that a company which has accepted a mere privilege to build a street railway, and has constructed and operated it may be compelled by the writ of mandamus to continue its operation. The opinion admits of that construction; but the important question, whether the mere grant of a privilege imposes a duty, is not discussed. The ordinance under which the company acted, however, contained a requirement that the "said railway shall be so operated that a car shall pass any given point each way on the route at least every twenty minutes for twelve hours, and at least once every thirty minutes for four hours, during that part of the day the road shall be operated." These are words of command, and may be construed as making it the duty of the company, in case it should construct and operate its road, to continue to operate every part of its line. The opinion, we think, might have been safely

placed upon this requirement. But whether such was or was not the intention of the court, we cannot say, from the opinion.

In the case of *People v. Albany etc. R. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295, the company had completed its entire line, but had ceased to operate a part of it; and a suit was brought in equity to compel a specific performance of that duty. It was held that a specific performance could not be compelled in that form of action, and that the suit was properly dismissed. The judge who wrote the opinion expressed the view that the only remedy was by quo warranto to forfeit the charter; but in this the majority of the court did not concur. It is evident, however, that the right to a writ of mandamus was not involved in that decision.

The legislature, in creating a corporation, has the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case, the proposed corporators may accept or not; and in the latter, if they do accept, they may be compelled by mandamus to perform the duties so imposed. But to say that in granting a charter to do a public service there is no difference between making it lawful to do an act and imposing it as an obligation to perform it is to say that, by reason of the public interest involved, language is to have a different construction and effect from what it would have in statutes in general, or in private contracts. Expressions may be found, in the opinions of courts, which countenance that doctrine, but we think there it is based upon an assumption that cannot be maintained ⁵²⁷ upon sound principle. In legislating, the law-making power undertakes to determine what is to the interest of the public, and, under the limitations of the constitution, it is the sole judge of what will promote the public utility, and must be presumed to be capable of expressing its will in intelligible words. When, therefore, a corporation, whether quasi-public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed.

The allegations in the petition in this case show that the respondent company was chartered merely for the purpose of constructing and operating street railways in the city. The special act merely gave it the right of corporate existence for the pur-

pose indicated: *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480. The streets were under the control of the city council. The company could do nothing without the consent of the council. The franchise in question was granted by the city council, and the claim is that it is by virtue of that concession, and its acceptance by the company, that the duty arose. But the ordinance (which is quoted above) merely grants "the privilege" of constructing and maintaining street railways over the lines therein designated. No clearer words of mere permission could have been employed. Not only this, but there is in the ordinance neither sentence, phrase, nor word that indicates that it was the intention of the council to make it a condition of the acceptance of its grant that the company should be bound to construct and operate railways over the streets which were therein specified. The company are required to observe all the ordinances of the city then existing, but it is not averred that there was any ordinance in existence at the time of the acceptance of the franchise which imposed that obligation.

The following succinct and accurate statement of the law from *Redfield on Railways* has been often quoted with approval: "Where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no specific or adequate remedy, the writ of mandamus will be awarded." It is clear that the ordinance in this case neither by express terms nor by implication imposes the duty upon the company. If the duty to construct and maintain the line is to be established, it must be upon the assumption that every privilege granted by a legislative body in reference to matter of public interest imposes upon the grantee who accepts it the duty to perform the acts he is allowed to perform. The assumption, in our opinion, is, as we have already intimated, not based upon sound reason, and is in opposition at least to the weight of authority.

Of the numerous similar franchises granted in this state many have doubtless been abandoned, without objection, so far as we are advised, from any quarter. It does not follow that a just objection may not ⁵²⁸ have been made; but the fact that none has been made serves, we think, in some measure, to show that the practical construction of such charters has been that the grant is permissive, and not obligatory.

We are of opinion also that the fact that the road has been constructed and operated, and that a part is now operated, makes no difference. Under the grant of a privilege to construct and

maintain, if after acceptance it is permissive only to construct, it is not obligatory to maintain. But we do not hold that the company can, against the will of the city, operate a part of its line and not the whole. A privilege to establish an entire line of street railway may be granted when the privilege of constructing and operating a part only would not be; and, for a failure to operate a part, it would seem that the whole might be forfeited. It seems to us that the remedy in this case is to forfeit the franchise to operate the branch line in controversy. The defendant in its answer offers to discontinue the operation of the branch, and apparently this would have been a good answer to the petition if an answer had been necessary.

We would not be understood as holding that the common law does not impose some duties upon companies chartered as common carriers which may be enforced by mandamus, although no mention of such duties may be found in their charters. All carriers who undertake to transport goods or passengers for the public assume certain duties to the public; but certainly carriers who are not corporations may at any time discontinue the business, if they elect to do so; and we see no good reason why corporations may not discontinue their enterprises when the charter does not in express terms, or by fair implication, forbid it. If it is the will of the legislature or of a municipal body, to whom the power to confer the privilege may have been granted, to impose upon the corporation the duty to construct and to continue to operate the work, instead of a mere permission to do so, it is not difficult so to provide by incorporating into the grant some language which evinces that intention.

It follows that, in our opinion, the trial court erred in overruling the demurrer to the petition, and that the court of civil appeals erred in not so holding. It not appearing that that petition may be amended so as to state a good cause of action, the judgment of the court of civil appeals and that of the district court are reversed, and the cause dismissed.

MANDAMUS—ISSUANCE AGAINST CORPORATIONS—RAILROAD COMPANIES.—When the charter of a corporation or a general statute in force and applicable to the subject imposes a specific duty, either in terms or by fair and reasonable construction and implication, the writ of mandamus will be awarded to compel the performance of such duty in the absence of other specific or adequate remedy: Monographic note to *Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 318; extended note to *Dane v. Derby*, 89 Am. Dec. 736. But a writ of mandamus to compel a railroad corporation to do a particular act can only be issued when there is a specific legal duty on its part to perform that act and clear proof of a breach of that duty: Monographic note to *Potwin v. Topeka Ry. Co.*, 37 Am. St. Rep. 321-323. See *Chicago etc. R. R. Co. v. State*, 47 Neb. 549; 53 Am. St. Rep. 557.

WILLIS v. CHOWNING.

[90 TEXAS, 617.]

SURETIES.—ON THE DEATH OF THE PRINCIPAL DEBTOR, the payee may look to the sureties as primarily liable to perform the contract, and need not present the claim to the administrator of the deceased principal for allowance and payment. Though the claim is presented to, and rejected by, the administrator, and the right to maintain an action thereon is lost by failure to commence it within the time allowed by statute, the right to recover of the surety is not thereby affected.

SURETIES—STATUTE OF LIMITATIONS.—THOUGH A DEBT IS BARRED AGAINST THE PRINCIPAL, judgment may be entered against a surety if he remains liable thereon, and if he pays the debt, a cause of action thereupon accrues in his favor against the principal, though the latter, because of the statute of limitations, was not, at the time of such payment, subject to an action in favor of the original payee.

APPEAL, DUTY TO PROSECUTE.—The sureties on an appeal bond are not released by the failure of the respondent to prosecute an appeal. That duty devolves on the appellant, and his failure to perform it cannot release his sureties.

EVIDENCE, SUFFICIENCY OF.—A PARTY IN A CIVIL CASE is not required to establish a fact to the satisfaction of the jury. It is error to so charge. It is sufficient that he establishes his allegations by a preponderance of the evidence.

ATTORNEY AT LAW, AUTHORITY OF TO RELEASE SURETY ON A DELIVERY BOND.—If an attorney at law agrees with a surety on a delivery bond that if he will procure and deliver to the sheriff the property specified in the bond, the surety shall be released from the judgment and from all claim for damages assessed for the value of the use of the property, the agreement is within the limits of the attorney's authority, and evidence that it was authorized or ratified by his client is unnecessary, if the property was in fact delivered to the sheriff by the surety.

SURETY ON DELIVERY BOND, RELEASE OF BY DELIVERY OF PROPERTY.—Where a surety on a delivery bond has delivered the property as called for by the bond, and it has been sold and applied to the satisfaction of the judgment, the judgment creditor cannot avoid the effect of such delivery or of a release granted to the surety because thereof by proving that the principal in the bond did not consent to the delivery.

Frank P. McGhee, for the plaintiff in error.

F. C. Beckett, for the defendant in error.

619 BROWN, A. J. Chowning sued Willis and Brother in the district court of Wilbarger county to set aside a sale of certain real estate made by virtue of an execution issued upon a judgment in favor of Willis and Brother and against the plaintiff, W. R. Morrison, and one Sumner. Upon the trial in the district court judgment was entered for the defendants, Willis and Brother, which was reversed by the court of civil appeals and a judgment entered for the plaintiff, Chowning, to review which this writ of error was granted.

The facts, as found by the court of civil appeals and as shown by the record, are in substance, that P. J. Willis and Brother recovered a judgment in the district court of Galveston county against C. M. Byars, the amount and date of which do not appear in the record, but it does appear that there still remains unpaid upon it about six thousand dollars. Upon that judgment execution was issued and, by the sheriff of Wilbarger county, levied upon two hundred head of cattle as the property of the defendant, C. M. Byars; the levy was "a range levy." Morrison made the affidavit of claim to the cattle and gave bond for the trial of right of property as required by law, with one Sumner and H. Chowning as his sureties upon the bond.

On the twelfth day of September, 1884, in the district court of Wilbarger county, P. J. Willis and Brother, in the case for trial of right of property on the claim and bond above stated, recovered a judgment against W. R. Morrison as principal and Sumner and Chowning as sureties for the sum of four thousand one hundred and eighty-nine dollars, from which judgment Morrison appealed, giving a supersedeas bond, but Chowning neither joined in the appeal nor signed the bond. The record fails to show what became of the appeal, but it was not prosecuted.

W. R. Morrison died in January, 1885; Tolbert was appointed administrator of his estate and, on the sixteenth day of May, 1885, filed a petition for writ of error in the case of Willis and Brother against Morrison, Sumner, and Chowning. Citation was issued and regularly served upon the defendants in error. The attorneys of both parties, in writing indorsed upon the petition, agreed that the writ of error should be dismissed, which agreement was dated November 28, 1885. The court of civil appeals finds that a supersedeas bond was executed by the administrator, but the plaintiffs in error challenged that finding as being without any evidence to support it. We find no evidence that a bond was given by the administrator, and it is not so alleged in the petition. Besides, as is well known, an administrator was not required to give bond, and we conclude that the statement was inadvertently made by the court.

About November, 1885, the judgment in favor of Willis and Brother against Morrison, Sumner, and Chowning was duly authenticated and presented to the administrator of Morrison for allowance, but was by the administrator rejected. After the expiration of ninety days from the time it was rejected by the administrator, suit was filed by Willis and Brother upon the judgment against the administrator of Morrison's estate, who pleaded the failure to sue within ninety days from the date of the rejec-

tion of the claim and upon that ground the suit was defeated. The plaintiffs in error object that there is no allegation in the petition under which the evidence as to the failure to sue within ninety days after the rejection was admissible. We find the following allegations in the petition: "That notwithstanding the solvency of said estate the said P. J. Willis and Brother, intending as aforesaid to vex, harass, and defraud this plaintiff, utterly failed and refused to present their said judgment to said administrator for approval and allowance and payment as the law directs in such cases until after the expiration of ninety days prescribed by law therefor, and by reason thereof their said judgment was rejected by said administrator and finally defeated in suit in the district court of Wilbarger county on appeal to the supreme court of Texas."

Execution was issued upon the judgment in favor of Willis and Brother against Morrison, Sumner, and Chowning on the thirteenth day of May, 1885, and on August 12, 1885, was returned indorsed "no levy by order of plaintiff's counsel." Morrison was dead at the time the execution was issued.

January 7, 1895, Willis and Brother procured the issuance of an execution upon the judgment in their favor against Morrison, Sumner, and Chowning, which execution was levied upon the land of Chowning now in controversy and under that levy the land was sold and purchased by Willis and Brother, they receiving a deed therefor.

Chowning alleges that he had returned the property for which the bond was given to try the right of property, the allegation being in the following words: "That after the rendition of said judgment against the said W. R. Morrison as aforesaid in his lifetime, to wit, on or about the twelfth day of September, 1884, this plaintiff turned over to George Diehl, ^{and} the agent and adjuster, and Henry Finch, the attorney, for the said P. J. Willis and Brother, through the sheriff of Wilbarger county, with the subsequent ratification of said P. J. Willis and Brother, all of said personal property so levied upon as aforesaid, in consideration of which and the further payment to plaintiff by said P. J. Willis and Brother of the sum of fifty dollars, the said P. J. Willis and Brother through the said Diehl and Finch did then and there release this plaintiff from any and all other and further liability on or under said judgment."

The court of civil appeals made no finding upon the issue presented by these allegations, and, upon examination of the record, we find the evidence upon it to be conflicting.

The court of civil appeals held that Chowning was discharged from liability on the judgment rendered in favor of P. J. Willis and Brother against W. R. Morrison as principal and Sumner and Chowning as sureties, and that the sale of the land was void, reversed the judgment of the district court, and rendered judgment in favor of Chowning upon the following grounds: 1. That the failure of P. J. Willis and Brother to bring suit against the administrator of W. R. Morrison upon her claim presented to and rejected by the administrator, within ninety days from the date of such rejection, operated to discharge the sureties Sumner and Chowning from further liability upon said judgment; 2. That the action of P. J. Willis and Brother, in agreeing to dismiss the writ of error sued out by Morrison's administrator, and in failing to prosecute to effect the appeal taken by Morrison in his lifetime, and the writ of error sued out by his administrator, had the effect to discharge the sureties on the appeal bond and on the writ of error bond, and therefore operated to discharge Chowning from liability on the judgment under which sale was made.

When the principal debtor in an obligation, to which there are sureties, dies, the payee may look to the sureties as primarily liable to perform the contract, and need not present the claim to the administrator of the deceased principal for allowance and payment: *Scantlin v. Kemp*, 34 Tex. 388; *Ray v. Brenner*, 12 Kan. 105; *People v. White*, 11 Ill. 341; *McBroom v. Governor*, 6 Port. 32; *Minter v. Branch Bank*, 23 Ala. 762; 58 Am. Dec. 315; *Ashby v. Johnston*, 23 Ark. 163; 79 Am. Dec. 102; *Vredenburg v. Snyder*, 6 Iowa, 39; *Johnson v. Planters' Bank*, 4 Smedes & M. 165; 43 Am. Dec. 480; *Boardman v. Paige*, 11 N. H. 437.

But it is claimed that the failure to institute suit within ninety days after the rejection of the claim by the administrator of Morrison barred the action of Willis and Brother against the estate, and, since Willis and Brother could not recover against the estate of Morrison, the sureties of Morrison were also discharged from further liability upon the judgment.

Although the debt may be barred by limitation as against the principal, yet judgment may be entered against the surety if he be liable thereon—in cases where suit may be maintained against the surety without joining the principal—and if the surety pay the debt which is at the time barred by limitation as against the principal, but is a valid obligation ⁶²² against the surety, such surety may recover against the principal, or against his estate in case of his death. The right of action in favor of the surety arises

when he pays the debt, and is not based upon the original debt itself, but upon the implied contract which exists by law between the principal and surety in such cases: *Faires v. Cockerell*, 88 Tex. 428; *Reeves v. Pullian*, 7 Baxt. 119; *Maxey v. Carter*, 10 Yerg. 521; *Marshall v. Hudson*, 9 Yerg. 57; *Peaslee v. Breed*, 10 N. H. 489; 34 Am. Dec. 178; *Crosby v. Wyatt*, 23 Me. 156; *Wood v. Leland*, 1 Met. 387.

In support of a contrary proposition the defendant in error cites the following authorities: *State v. Blake*, 2 Ohio St. 147, *Dorsey v. Wayman*, 6 Gill, 59, and *Auchampaugh v. Schmidt*, 70 Iowa, 642; 59 Am. Rep. 459. The authorities cited fairly support the contention of the defendant in error upon this question, but the overwhelming weight of authority, as well as sound reasoning, are against his contention. The proposition that the surety is discharged when the right of action is barred as against the principal rests upon the doctrine that the surety's action is based upon the right of subrogation to the claim of the payee in the contract, against which doctrine this court has held, in the case of *Faires v. Cockerell*, 88 Tex. 428, after a careful review of the authorities on the question.

Defendant in error urges upon this court that, although it be held that the plaintiffs in error were not bound to present the claim to Morrison's administrator, yet, having done so and having failed to establish the claim as required by law, the sureties are by such failure discharged. If the failure of Willis and Brother to sue upon their claim within ninety days or the fact that having sued subsequently, they were defeated upon that claim for the reason that their right is barred by the lapse of ninety days' time, had the effect to discharge the estate of Morrison from liability to the sureties, then it would follow that the sureties would be discharged from a claim against them by Willis and Brother. But a discharge of the administrator of Morrison's estate upon that ground will not have the effect to discharge the estate from liability to Chowning, in case he was compelled to pay the debt, therefore Chowning has suffered no injury by the failure of Willis and Brother to institute suit upon their claim within the time prescribed by law, nor by their failure to recover judgment against Morrison's estate when suit was instituted, and Chowning was not discharged by the bar of ninety days' limitation in favor of the estate: *Marshall v. Hudson*, 9 Yerg. 57. In the case last cited, a suit was instituted against the administrator of the principal debtor and against which the administrator pleaded the statutes of limitation and was discharged. Suit was afterward instituted against the surety, who

pleaded that the debt was barred as to the estate of the principal, and also the judgment in favor of the estate, claiming that it discharged him, but the court gave judgment against him. The surety paid the judgment and brought suit against the estate of the deceased principal to recover the amount. It was claimed as in this case that, the debt being barred against the principal, the surety could not recover because he had discharged no obligation which rested upon the estate of the principal, but ⁶²³ the court held that the surety was entitled to recover upon the implied obligation which arose under the law out of the relation of principal and surety.

In the case of *Pearson v. Gayle*, 11 Ala. 280, the principal debtor having died, the creditor presented his claim for allowance to the administrator, but failed to comply with the law so as to establish his right, and it was claimed on behalf of the surety, when sued for the debt, that, the creditor having presented his claim and having failed to establish it, the estate was discharged, which operated to discharge the surety likewise; but the court in that case held that the voluntary act of the creditor in presenting his claim to the administrator for allowance and the failure to pursue the same as required by law could not be given the effect to discharge the surety upon the contract, because it did not interfere in any manner with his right under the implied contract between the principal and the surety; we think that the decision is sound upon principle and applicable to the facts of this case. Chowning was not discharged from liability upon the judgment upon this ground.

The court of civil appeals evidently fell into error in stating that the sureties upon the writ of error bond given by the administrator of Morrison were discharged by the agreement to dismiss the petition for writ of error, because there was no such bond given and no such bond was required by law to be given by an administrator. But the court also bases its decision upon the ground that it was the duty of P. J. Willis and Brother to prosecute the appeal taken by Morrison, as well as the writ of error sued out by his administrator, to effect, and that, having failed to do so, the sureties upon the original bond for trial of right of property were discharged. We know of no law that makes it the duty of the appellee or the defendant in error to prosecute the appeal or the writ of error to effect. That duty devolves upon the party who takes the appeal or sues out the writ of error. Chowning, therefore, was not discharged from his liability upon the judgment upon this ground.

The court of civil appeals erred in rendering judgment against plaintiffs in error. It becomes necessary to examine the assignments of error presented in the court of civil appeals by the appellant Chowning, to ascertain if there are other grounds upon which he is entitled to a reversal of the judgment of the district court.

Chowning alleged in his petition that, by agreement entered into between himself and one Diehl, agent of P. J. Willis and Brother, and also one Finch, attorney for the same parties, engaged in the conduct of that cause, he, Chowning, on the day the judgment was entered, delivered to the sheriff of Wilbarger county the property which had been levied upon as belonging to Byars, and claimed by Morrison, the same for which the claim bond was given. The cattle had been levied upon as they ran upon the range by what is termed a range levy, and were by Chowning redelivered to the sheriff in like manner. Chowning also alleged that there was an agreement between himself and the attorney and agent of Willis and Brother that, upon such delivery being made, he, Chowning, was ⁶²⁴ to be discharged from further responsibility on the judgment rendered in favor of Willis and Brother against Morrison as principal and Sumner and Chowning as sureties. The evidence upon this issue was conflicting, but we think that it tended strongly to establish the fact of delivery by Chowning to the sheriff, the agreement of the counsel and agent of Willis and Brother as well as the ratification by Willis and Brother of the act of their attorney and agent. There was no proof of special authority from Willis and Brother to the agent or to the attorney to make the agreement, but the facts which attended the transaction, with the subsequent levy upon the same property as the property of Byars, and the further fact that Chowning aided in gathering the cattle, for which he was reimbursed by Willis and Brother, together with a failure of the latter to enforce their judgment against Chowning for more than ten years, are, we think, sufficient to support a verdict sustaining the allegations made.

This seems to have been the only issue submitted to the jury, upon which the court charged them, in effect, to find for the defendants unless they found that Chowning had been released from the judgment by Willis and Brother or by their authorized agent or attorney; and upon this point the court instructed the jury as follows: "In determining whether or not Chowning was released from the judgment against him you are instructed that P. J. Willis and Brother will not be bound by a release, if any, given or promised by their agent or attorney, George Diehl or

Finch, unless the evidence before you establishes, to your satisfaction, that they, P. J. Willis and Brother, authorized the said Diehl and Finch to make or give such release, or that, being thereafter informed of the giving or promising of such release to Chowning, P. J. Willis and Brother ratified the same."

After retiring, the jury propounded to the court a question in writing upon this issue, which shows that the question of authority in the attorney to make the agreement was the vital point in the case, to which question the court answered as follows: "In answer to the questions submitted by you I give you the following additional instructions, viz: An agent or attorney cannot release his principal's or employer's debtor simply by virtue of such agency or employment, but must be specially authorized by his principal so to do. But if a release is given by an agent or attorney in the absence of such special authority, then if the principal or employer, with full knowledge of such acts by his agent or attorney, ratifies or consents to such release, it would be as binding as if specially authorized before the giving of such release."

Chowning assigns the giving of the charges above quoted as error, specifying the following points of objection: 1. That it was error in the court to charge the jury in effect that the evidence must establish to their satisfaction that Willis and Brother authorized Diehl or Finch to make the agreement or that they ratified it in order to entitle him to the benefit of the discharge; 2. That under the facts of this case the attorney who represented Willis and Brother in the prosecution of that cause had authority by virtue ⁶²⁵ of his employment, to make the agreement, and the charge of the court that a special authority was necessary was error.

The law required Chowning to establish his allegations by the preponderance of the evidence, but the charge of the court required him to produce evidence sufficient to establish greater degree of certainty in the minds of the jury than was demanded by law, which was error for which this judgment must be reversed: *Galveston etc. Ry. Co. v. Matula*, 79 Tex. 582; *Galveston etc. Ry. Co. v. Harriett*, 80 Tex. 82. It is not unfrequently the case that men in the ordinary affairs of life act upon a state of facts which does not satisfy the mind, but the preponderance is in favor of the action taken. No higher degree of certainty is required in evidence when presented to men sitting on a jury to enable them to pass upon the actions of others.

The primary obligation of Chowning as surety upon the bond of Morrison to try the right of property was that, in case Morri-

son should fail to establish his claim, the property would be returned to the sheriff in as good condition as when Morrison received it, and the payment of damages assessed by the court and the value of the use of the property: Rev. Stats., sec. 5288. In case the parties failed to return the property within ten days, the plaintiff was entitled to enforce the judgment against the principal and the sureties. There is nothing in the record of this case to show that the court awarded any damages against Morrison and his sureties, or that the use of the cattle was worth anything to them. The return of the property levied upon and for which the bond was given accomplished the main purpose of the bond.

Article 5310 of the Revised Statutes provides: "If, within ten days from the rendition of said judgment, the claimant shall return such property in as good condition as he received it, and pay for the use of the same, together with the damages and costs, such delivery and payment shall operate as a satisfaction of such judgment." The claimant and his sureties had the right under this article of the statute to return the property within ten days and discharge the judgment by paying the damages, if any, and the value of the use of the property and costs of suit. It was, therefore, not necessary for Chowning to have the consent of the attorney or agent to return the property to the sheriff, and the only thing that was done in the transaction to which the consent of the attorney was necessary was discharging Chowning from liability for the damages, if any were assessed, and for the value of the use of the property and costs, and we believe that these matters fall within the line of the attorney's authority in prosecuting the suit, about which he might make such agreements as were necessary in order to secure the interests of his client: *Lee v. Wharton*, 11 Tex. 73; *Webb v. White*, 18 Tex. 572. The damages and the value of the use of the property and costs were not parts of the original debt, but mere incidents arising out of the proceeding conducted by the attorney. It would be a narrow limit within which to place the authority of counsel in the prosecution of causes of this kind to say that there must be special authority given to him by his client for ⁶²⁶ every action that he takes by which he might release the matter of costs or damages in order to protect his client's more substantial interests. We therefore conclude that, if the testimony establishes the fact that Finch, the attorney of Willis and Brother, agreed to release Chowning from the judgment in case he delivered the property to the sheriff, and that Chowning, in pursuance of that agreement, did make such delivery to the sheriff, then Chowning was

discharged from the judgment, and a sale under it thereafter would be void.

The court also charged the jury in substance that the consent of W. R. Morrison to the surrender of the cattle was necessary in order that such surrender might work a discharge of Chowning, the surety. We are not prepared to say that a surety may not surrender property for which he is bound upon a bond of this character, even in opposition to the will of the principal, if the surety is able to deliver the possession to the sheriff. It is, however, unnecessary to decide that question in this case, because it does not lie in the mouth of Willis and Brother to raise the question of want of Morrison's consent, if it appears from the evidence that the property was actually delivered to the sheriff, or delivered to him upon the range in the same manner as it was levied upon, and was subsequently sold by the sheriff under an execution against Byars and the proceeds paid over to Willis and Brother, as we understand the evidence to strongly indicate if not to establish beyond dispute.

Because the court erred in the charge complained of, the judgment of the district court was rightly reversed by the court of civil appeals, but that court erred in giving judgment for Chowning for the land in controversy. It is therefore ordered that the judgment of the court of civil appeals, in so far as it renders judgment against P. J. Willis and Brother in favor of Chowning, be reversed and set aside, and that, in so far as the judgment of said court reverses the judgment of the district court, the same be affirmed, and that this cause be remanded to the district court for further trial in accordance herewith. It is ordered that P. J. Willis and Brother pay the costs in the court of civil appeals and that the defendant H. Chowning pay the costs of this court.

SURETYSHIP—DEATH OF PRINCIPAL DEBTOR.—The failure on the part of the creditor to present his claim to the administrator of the principal debtor within the statutory time after the grant of letters does not discharge the sureties of such principal, nor affect creditors' rights to proceed against them: *Minter v. Branch Bank*, 23 Ala. 762; 58 Am. Dec. 815; *Johnson v. Planters' Bank*, 4 Smedes & M. 165; 43 Am. Dec. 480. See, also, *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235, and note.

LIMITATIONS OF ACTIONS—SURETYSHIP.—The statute of limitations begins to run against a surety who, having paid the debt of the principal, seeks to recover from him what he was compelled to pay for him, not from the time when the principal debtor became liable, but only from the time when the surety actually paid the creditor: Extended note to *Scott v. Nichols*, 61 Am. Dec. 504. See monographic note to *Gross v. Davis*, 10 Am. St. Rep. 641; *Hammon v. Myers*, 30 Tex. 375; 94 Am. Dec. 322. Also, *Ashby v. Johnston*, 23 Ark. 163; 79 Am. Dec. 102.

APPEAL BONDS—LIABILITY OF SURETIES.—The controlling principle which, in the absence of other considerations, determines the liability of one who executes an appeal bond, is, as in the case of other contracts of suretyship, that he is entitled to stand upon the express terms of his contract: Monographic note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 702-719, on the liability of sureties on appeal bonds.

INSTRUCTIONS—WEIGHT OF EVIDENCE.—In a civil case, it is error to instruct the jury that there must be sufficient evidence to "convince their minds of any fact necessary to be shown." The weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case: *Murphy v. Waterhouse*, 113 Cal. 467; 54 Am. St. Rep. 365, and note.

ATTORNEY AND CLIENT—IMPLIED POWERS OF ATTORNEY.—An attorney at law regularly retained in a cause has very large, if not exclusive, power and authority in the management and prosecution of the suit, in all matters that affect the remedy merely, and not the cause of action itself: Extended note to *Commissioners v. Younger*, 87 Am. Dec. 166. See, also, monographic note to *Clark v. Randall*, 76 Am. Dec. 256-265, on powers of attorneys at law.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

BUCKSTAFF v. HICKS.

[94 WISCONSIN, 84.]

LIBEL IN PROCEEDINGS BEFORE A CITY COUNCIL.—A report of the proceedings of a city council including the remarks made by a person there in attendance, if libelous, is not privileged, if there is no law requiring the publication of such report or remarks.

LIBEL, WHEN NOT PRIVILEGED.—The publication of libelous remarks made by a person in attendance before a meeting of a city council is neither qualifiedly nor conditionally privileged, where it is not made by one who owes a duty, or has an interest in the subject matter, to one to whom the duty is owing or to one who has a corresponding interest.

LIBEL.—THE PUBLICATION OF LIBELOUS REMARKS MADE AT A MEETING OF THE CITY COUNCIL by a member of one branch of the state legislature explaining why a proposed municipal charter had not been enacted by such legislature and accusing a member of another branch of drunkenness is not privileged, especially if the newspaper containing such publication has a general circulation beyond the limits of the municipality.

JURY TRIAL, HARMLESS ERROR IN REFUSING INSTRUCTIONS.—A refusal of the court, on a trial for libel, to instruct the jury that if the article published was a fair and accurate account of the remarks made by the person to whom they were attributed, this may be considered in mitigation of damages, is not erroneous, if the plaintiff had waived all claim for punitive damages, and the jury had been so instructed.

LIBEL.—AN INSTRUCTION to a jury, on the trial of an action for libel, that in estimating damages they may consider the plaintiff's injured feelings and tarnished reputation, taking into account the nature of the imputation, the extent of its publicity, the character, condition, and influence of the parties, and all the surrounding circumstances, is not incorrect, nor is it susceptible of the construction that it authorizes the jury to take into consideration the wealth of the defendant.

Action for the libel of plaintiff by publishing in a newspaper what purported to be a report of a meeting of the city council of Oshkosh. The plaintiff was, at the time, a member of the state senate, representing that city and some adjacent territory in the same county. At the meeting a Mr. Pratt, representing the same constituency in the house of representatives, attempted to explain why a proposed charter of the municipality had not been enacted. He attributed its failure to the defendant, and said, "It was a bad state of affairs when a man like him, who was four-fifths of the time in a state of intoxication, could dictate to the common council what the character of the amendments should be." There was a conflict of testimony as to whether the meeting before which these remarks were made was a meeting of the common council and whether the assemblyman charged the plaintiff with intoxication. Verdict for the plaintiff, and the defendant appealed.

Hume, Oellerich & Jackson, for the appellant.

F. W. Houghton and Bouck & Hilton, for the respondent.

²⁸ WINSLOW, J. The publication complained of was libelous if not privileged, and this is the controlling question on this appeal. A verdict for the plaintiff was directed; hence it must be assumed that Assemblyman Pratt actually made the remarks attributed to him, and that he made them at a meeting of the common council, there being competent evidence before the jury tending to prove both of these facts. Proceeding upon this assumption, the question whether the publication of the defamatory words was privileged will be considered.

The proceedings of legislative bodies, of courts, and of military and naval tribunals are privileged. In these cases the privilege is said to be absolute, and, though this may ²⁹ not be strictly accurate, it is unnecessary at present to discuss the question, because the publication in issue does not fall within this class. The second class of privileged publications or communications is said to be conditionally privileged from the fact that the privilege depends upon the good faith of the party making the defamatory publication. Cases of conditional or qualified privilege may be divided into three general classes, viz: 1. Fair reports of the proceedings of courts and legislative bodies; 2. Where the defendant, in good faith, in the performance of a duty, makes a communication to another to whom he owes the duty; 3. Where one who has an interest in the subject makes a communication relating thereto to another having a corresponding interest.

It is certain that the publication in question is not the report communication made, or claimed to have been made, by Mr. "legislative body," in this connection, has not been extended to cover a city council meeting: Newell on Defamation, Slander, and Libel, 559; Odgers on Libel and Slander, 260. Doubtless, an official report of a city council meeting required to be published by law in the official city paper would be privileged; but that is not the present case. The report before us was not an official report. No official report of the meeting was ever made or published. The article in question was a mere voluntary report, published as an item of news; hence it cannot be protected as an official report of a council meeting probably would be, nor does the fact that the newspaper was in fact the official paper of the city cut any figure.

The publication, then, not being privileged as a report of the proceedings of a legislative or judicial body, the question arises whether it falls under either of the other two classes of publications above named which are entitled to a qualified or conditional privilege. The cardinal principle with reference to these last-named publications or communications ⁴⁰ is, that they must be made in good faith, by one who owes a duty or has an interest in the subject matter, to one to whom the duty is owing, or to one who has a corresponding interest. Now, as to the original communication made, or claimed to have been made, by Mr. Pratt to the common council, it might plausibly be claimed under the foregoing definitions that, if made in good faith by him believing it to be true, it was privileged. The council had proposed certain amendments to the city charter, and sent them to the legislature for action; and Mr. Pratt was explaining to the council the reason, as he understood it, why they failed to be acted upon by the senate. It can easily be seen that the argument in favor of the privilege in such a case would be worthy of very serious consideration. But the publication of those remarks to the world is an entirely different matter. The remarks were made by the city's representative in the assembly to the city's representatives in the council, purporting to give information as to the conduct of the representative of the city in the senate with reference to the passage of charter amendments. Now, conceding that such remarks made in good faith were privileged, the privilege did not extend to their publication to the world. Mr. Pratt could not have had his remarks printed and circulated over the state or in adjoining counties, and take refuge behind the fact that he first communicated them to the council, and that such communication was privileged, and hence

that the privilege attached to a republication of them to the world. The evidence showed that the newspaper in question circulated in adjoining counties and cities outside of the county of Winnebago, and outside of the plaintiff's senatorial district. To claim that there was any duty, public or private, resting on the defendant to publish such a charge against the plaintiff in these localities is to demonstrate the absurdity of the claim. There was not only no duty, but there was certainly no tangible ⁴¹ interest in the subject matter on the part of the people outside of the plaintiff's district. Thus, it is very plainly seen that the publication, even if it could be considered as privileged when made to a citizen of Oshkosh who might be said to be interested in the subject matter, could not be made broadcast to the world and preserve its privileged character. The publication is excessive. It must be confined to people to whom the defendant owes a duty to speak, or who have an interest with the defendant in the subject matter: *Rude v. Nass*, 79 Wis. 321; 24 Am. St. Rep. 717.

There are two minor questions raised. An instruction was asked to the effect that, if the article published was a fair and accurate account of Mr. Pratt's remarks, this fact might be considered in mitigation of plaintiff's damages. This instruction was refused, and error is claimed. The ruling was correct. The plaintiff had abandoned all claim for punitive damages, and the circuit judge had so instructed the jury; hence there could be no recovery save for actual or compensatory damages. These cannot be mitigated by circumstances showing good faith: *Grace v. Dempsey*, 75 Wis. 313.

The circuit judge charged the jury that, in estimating damages, they were to consider the plaintiff's injured feelings and tarnished reputation, "taking into account the nature of the imputation, the extent of its publicity, the character, condition, and influence of the parties, and all the surrounding circumstances." It is said that the word "condition," in this sentence, must mean "wealth," and hence that the jury were charged that, in estimating compensatory damages, they might consider the wealth of the defendant. This would undoubtedly be error if such were the legitimate and natural construction of the word, but we do not think it would naturally be so understood. We construe it as referring to social standing, and think it must have been so understood by the jury.

By the Court. Judgment affirmed.

LIBEL—PRIVILEGED COMMUNICATIONS—PROCEEDINGS OF PUBLIC MEETING.—The publication of a libel cannot be just-

filed on the ground that it is a mere repetition of what had already been said or otherwise published by some other person or periodical. The fact that a former publication took place at a public meeting and was a part of the proceedings of such meeting, or of a speech there delivered, or a report there made or filed, does not render the rule inapplicable, unless the meeting is that of some official body whose proceedings may be rightfully published within proper limits: *Monographic note to McAllister v. Detroit Free Press*, 15 Am. St. Rep. 347; extended note to *Aldrich v. Press Printing Co.*, 86 Am. Dec. 91.

LIBEL—INSTRUCTIONS AS TO DAMAGES.—An instruction that the jury should give nominal damages only, if the reputation of the plaintiff was, prior to the libelous publication, bad with respect to the matters of which he was accused, should be refused because the verdict of a jury cannot be restricted to nominal damages unless they believe that such damages will compensate plaintiff for the wrong suffered by such publication, and that exemplary damages should not be given: *Edwards v. San Jose Printing Soc.*, 99 Cal. 431; 37 Am. St. Rep. 70. See, also, *Childers v. San Jose etc. Pub. Co.*, 106 Cal. 284; 45 Am. St. Rep. 40. Damages on account of a libel may include mental suffering and loss of character: *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75, and note.

KUNZE v. KUNZE.

[94 WISCONSIN, 54.]

JUDGMENTS—PLEADINGS.—In suing upon the judgment of a court of any other state it is not necessary to allege the jurisdictional facts. If the judgment was amended after its entry, it is sufficient to aver that the judgment was entered in a court designated, and that it was afterward duly amended.

DECREE FOR ALIMONY, ACTION UPON.—If a decree awarding alimony has the effect of a judgment at law in the state wherein it was entered, an action at law may be maintained thereon in another state.

E. Blewett, for the appellant.

Duffy & McCrory, for the respondent.

57 WINSLOW, J. This is an action brought to recover alimony adjudged to the plaintiff in a divorce action heretofore brought in Illinois. It appears by the complaint that the court in which the divorce action was brought—i. e. the circuit court of Cook county, Illinois—was a court of general jurisdiction, as its name indicates; hence it was unnecessary to allege any jurisdictional facts: *Jarvis v. Robinson*, 21 Wis. 523; 94 Am. Dec. 560. The allegation that the judgment was rendered in that court, and that it was afterward duly amended, are sufficient in the first instance. From these facts jurisdiction is presumed. If in fact there was any want of jurisdiction, it is a fact to be set up by answer: *Jarvis v. Robinson*, 21 Wis. 523; 94 Am. Dec. 560.

It is further alleged in the complaint by apt averments that, by the laws of Illinois, the amended decree for the payment of alimony has the force and effect within that state of a judgment at law for the payment of money. If such be its force and effect, we see no reason why an action at law for its recovery may not be maintained in this state. It is quite well established that an action at law lies on a final decree of a court of equity of another state for the payment ^{of} of a specific sum of money: *Moore v. Adie*, 18 Ohio, 430; *Pennington v. Gibson*, 16 How. 65; *Allen v. Allen*, 100 Mass. 373; *Black on Judgments*, sec. 962, and cases cited. If a divorce judgment decree the payment of a specific sum absolutely as alimony, and if (as alleged in this case) such decree has the effect in that state of a judgment at law for the payment of money, there seems no reason why such a decree may not be enforced by action at law in another state: *Dow v. Blake*, 148 Ill. 76; 39 Am. St. Rep. 156; *Barber v. Barber*, 21 How. 582; *Allen v. Allen*, 100 Mass. 373. This doctrine is not contrary to the principle stated in *Barber v. Barber*, 2 Pinney, 297, where an action at law was held not to lie to enforce payment of certain installments of a New York decree for alimony. That ruling was based expressly on the fact that, under the law of New York, the decree was temporary only, and not an absolute decree for the payment of a sum certain, and had not the effect of a judgment at law. Nor is there anything in the decision of the case of *Guenther v. Jacobs*, 44 Wis. 354, which conflicts with the position here taken.

By the Court. Order reversed, and action remanded for further proceedings according to law.

JUDGMENTS OF SISTER STATES—ACTIONS UPON.—Under the constitution of the United States, the judgment of a sister state must be accorded in this state the same faith and credit which it has in the state where it was rendered: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390; 45 Am. St. Rep. 872, and note. If such a judgment is sued upon in a state other than that in which it was rendered, it must be given the same force and effect as it is entitled to in the state wherein it was rendered: *Dow v. Blake*, 148 Ill. 76; 39 Am. St. Rep. 156, and note. In such an action, jurisdictional facts need not be alleged: *Specklenreyer v. Dailey*, 23 Neb. 101; 8 Am. St. Rep. 119, and note.

EINGARTNER v. ILLINOIS STEEL COMPANY.

[94 W. SCONS. 70.]

JURISDICTION OF TRANSITORY ACTIONS.—An action to recover for injuries to the person of the plaintiff is transitory, and the courts of this state have jurisdiction over it if the defendant is served with process therein, though both parties reside in another state wherein the cause of action arose.

JURISDICTION OF TRANSITORY ACTIONS between aliens may be declined if the cause of action arose in another country.

JURISDICTION OF A TRANSITORY ACTION IN FAVOR OF THE RESIDENTS OF ANOTHER state cannot be declined by the courts of this state, though the cause of action arose in such other state of which both parties to the action were then, and yet are, residents.

CITIZENS OF EACH STATE, PRIVILEGES AND IMMUNITIES OF IN OTHER STATES.—The right to go into another state and to sue in its courts upon a cause of action arising in favor of the plaintiff in the state of his residence is a privilege guaranteed to him by section 2 of article 4 of the constitution of the United States.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE NOT.—If the plaintiff was employed in a factory, and the floor of the room in which he worked had to be taken up and replaced by a gang of workmen, he having no duty to perform in connection with them, he and they are not fellow-servants, and hence he may recover of their common master for injuries suffered from their negligence.

TRANSITORY ACTIONS CALLING FOR THE ENFORCEMENT OF THE LAWS OF ANOTHER STATE.—Jurisdiction of a transitory action cannot be declined by the courts of this state because the right of action accrued in another state, and there is a slight variance between the laws of the two states, not amounting to a fundamental difference of policy.

J. W. Wegner and C. H. Van Alstine, for the appellant.

Van Dyke & Van Dyke & Carter, for the respondent.

74 WINSLOW, J. Two important questions arise in this case, viz: 1. Whether the court could, in its discretion, dismiss the case because the parties were both residents of the state of Illinois and because the cause of action arose in the state of Illinois, jurisdiction of the person of the defendant having been obtained within this state; 2. If the court could not dismiss the case for this reason, then whether the evidence of the plaintiff was sufficient to entitle him to have the case submitted to the jury upon the merits. These questions will be considered in the order indicated.

This is an action to recover damages for injuries to the ⁷⁵ person. It is, therefore, purely a transitory action, and the principle that the courts of this state have jurisdiction to entertain such an action, although the cause arose in Illinois and the parties are residents of Illinois, is unquestioned: *Curtis v. Bradford*, 33 Wis. 190. A court of this state would even have jurisdiction of a transitory

action of this nature where it arose in a foreign country, or on the high seas, and both parties to the action were aliens, provided jurisdiction of the person could be obtained: *Gardner v. Thomas*, 14 Johns. 134; 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543; 13 Am. Dec. 564; *Great etc. Co. v. Miller*, 19 Mich. 312. But, while it is held that a court has jurisdiction and may administer relief in an action between aliens brought upon a cause of action arising in foreign lands, it is also held that there is a certain discretion which may be used by the court in entertaining such actions, and that the court may dismiss such an action if, for any reason, it seems improper to take jurisdiction. In the present case, it is practically claimed by defendant that this rule applies to such an action as the present; in other words, that citizens of another state of this Union are to be treated in the courts of this state precisely as if they were aliens, and that a cause of action arising in another state is to be treated as though it arose in a foreign country; and this really is the first question to be settled.

It is provided by the constitution of the United States (Const., art. 4, sec. 2) that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The first attempt at a comprehensive definition of this clause of the federal constitution seems to be made in the case of *Corfield v. Coryell*, 4 Wash. C. C. 371, where Mr. Justice Washington, referring to this section of the constitution says: "The inquiry is, What are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, ⁷⁶ which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. . . . They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of every kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxation and impositions than are paid by the citizens of the other state, may be mentioned as

some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

The subject was again considered in *Ward v. Maryland*, 12 Wall. 418, where it is said by Mr. Justice Clifford, who wrote the opinion in that case, referring to the words "privileges and immunities" in this section: "Beyond doubt, these words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." In referring to the same subject in *Paul v. Virginia*, 8 Wall. 168, Mr. ⁷⁷ Justice Field, in the opinion of the court, after defining the object of the constitutional provision in question in quite similar terms, very aptly says: "It has been justly said that no provision in the constitution has tended so much to constitute the citizens of the United States one people as this."

These decisions are all referred to with approval in the opinion of the supreme court of the United States in the *Slaughter-House* cases, 16 Wall. 36. See, on this same subject, the following cases, which are in harmony with the cases just quoted: *Lemmon v. People*, 20 N. Y. 608; *Campbell v. Morris*, 3 Har. & McH. 535. A case almost identical in its facts with the case before us is the case of *Cofrode v. Circuit Judge*, 79 Mich. 332, where this provision of the constitution of the United States is directly construed as guaranteeing the right to a citizen of another state to bring suits in the state of Michigan in any case where a citizen of Michigan was entitled to bring such suit. Indeed, we have been referred to no cases holding the contrary of this proposition, except, possibly, the case of *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 22 Am. St. Rep. 17, where it was held that a Texas court might refuse to take jurisdiction of an action between a Choctaw Indian and a resident of another state, founded upon a cause of action accruing in another state. We do not, however, regard this case as of value as authority on this question, because it was held to be a local action, and not transitory. If this was the case, of course the courts of Texas could not entertain it, whatever the citizenship of the parties. Therefore, what is said at the close of the opinion with regard to the power of dismissing the case on account of the residence of the parties—

is obiter. Moreover, the question of the rights of a citizen of another state under the constitution could hardly arise in a case where the plaintiff was a member of an Indian tribe, and consequently not a citizen of any state.

⁷⁸ We are entirely satisfied that one of the "privileges and immunities" referred to in the constitutional provision is the right to bring and maintain an action in the courts of the state. Any citizen of this state may bring an action in the circuit court of this state upon a transitory cause of action arising in another state, and against a citizen of another state, provided he can obtain jurisdiction of the person of the defendant in this state. This is one of the rights guaranteed him under our constitution and laws. If the words "privileges and immunities" in the constitutional clause in question refer to the right to maintain actions, then a resident of another state has the same right to bring an action in the courts of this state upon a cause of action arising in another state, and against a citizen of another state, that a citizen of this state has, because the constitution guarantees him the same right as the citizen of this state. We entirely approve the doctrine held by the supreme court of Michigan in *Cofrode v. Circuit Judge*, 79 Mich. 332, and therefore hold that the trial court could not dismiss this action merely because the parties were both citizens of Illinois, and the cause of action arose in Illinois.

The question then arises whether the court was right in dismissing the case on the merits, either because no cause of action was proven, or on account of the supposed conflict of the laws of Illinois and Wisconsin.

This court has held, as we have seen, that an action to recover for personal injuries negligently inflicted in another state is a transitory action, and is triable in the courts of this state, provided jurisdiction of the person is obtained: *Curtis v. Bradford*, 33 Wis. 190. This doctrine is in accord with the decisions everywhere, and it is unnecessary to cite authorities. Another rule has been applied, however, by some of the decisions, with regard to actions founded on a statute of another state where such statute is inconsistent with the law of the forum. Thus, it has been held by this ⁷⁹ court in *Anderson v. Minneapolis etc. Ry. Co.*, 37 Wis. 321, that the courts of this state will not enforce a cause of action arising in Iowa under a statute of that state making an employer liable to his employé for injuries suffered by reason of the negligence of his fellow-servant, because it was the settled law of this state at that time that such an action would not lie. For cases holding similar doctrine,

see Story on Conflict of Laws, 8th ed., sec. 625, p. 844, note a; Richardson v. New York etc. Ry. Co., 98 Mass. 85. This doctrine has been substantially disapproved by the supreme court of the United States, and by some other courts: Dennick v. Railroad Co., 103 U. S. 11; Herrick v. Minneapolis etc. Ry. Co., 31 Minn. 11; 47 Am. Rep. 771. The question, however, does not arise in this case, and hence it is unnecessary to consider upon which side the weight of reason and authority preponderates. The present action is not founded upon any statute of one state not existing in others, but upon certain fundamental and well-settled principles of the common law which prevail in most states of the Union. The principles involved are, briefly: 1. Ordinary negligence by one person, proximately causing personal injury to another, to whom the first owes a duty of care, raises a right of action in the person injured; 2. In order to recover for such injuries, the injured person must himself have been in the exercise of ordinary care at the time of the injury; 3. A servant cannot recover damages of his master for injuries caused solely by the negligence of his fellow-servant; 4. When the master undertakes to furnish the servant a place to work, with the preparation of which place the servant has nothing to do, then it is the master's duty to furnish a reasonably safe place to work, and this duty cannot be delegated; and the servant who prepares such place for work is not, in the eye of the law, a fellow-servant with the other.

These principles are well established in this state, and the ⁸⁰ decisions of the supreme court of Illinois offered in evidence on the trial show that they are recognized in that state: Lake Shore etc. Ry. Co. v. Hessions, 150 Ill. 546; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Libby v. Scherman, 146 Ill. 540; 37 Am. St. Rep. 191.

Now, the complaint in the present case clearly states a cause of action under the common law for negligence, and the plaintiff's evidence was sufficient to go to the jury under the foregoing principles of the common law, recognized alike in both states. The evidence, in brief, tended to show that the floor upon which the plaintiff tripped was a place for him to work in, with the preparation of which he had no duty to perform. If this was so, then, under the principles laid down in Cadden v. American etc. Co., 88 Wis. 409, and Libby v. Scherman, 146 Ill. 540, 37 Am. St. Rep. 191, we think the "carpenter gang," whose duty it was to replace the planks, were not fellow-servants of the plaintiff. If they were not fellow-servants, but were simply discharging a duty of the master, then, if they left the plank in question loose, and the plaintiff, without contributory negligence, suffered injury

thereby, their failure was failure of the master, under the principles settled in the last-named cases.

We are not to be understood as attempting in advance to lay down rules for the retrial of this case. We have proceeded thus far in the discussion of certain fundamental principles of the law of negligence for the purpose simply of showing that upon these questions, which are the leading and important questions in this case, the law as expounded by the courts of last resort in both states is in substantial accord. The case, then, is this: A transitory cause of action arose and became vested in Illinois, under principles of the common law recognized in both Illinois and Wisconsin alike; and the question is, Can it be prosecuted to judgment in the courts of Wisconsin, jurisdiction of the person having been obtained? We are clearly of the opinion that there⁸¹ can be but one answer to this question, and that in the affirmative.

It is said, however, that there are some differences in the law as administered in the two states with reference to the question of whether a person employed by the same master is a fellow-servant or a vice-principal, and that in this respect the laws of Illinois are more favorable to the plaintiff than those of Wisconsin. Upon this basis the trial court held that the case depended upon principles of law which are obnoxious to the law of this state, and that it had no jurisdiction to administer the law of Illinois. It is well known that courts are frequently called upon to administer and enforce the laws of another state. Doubtless, upon the trial of this case the plaintiff's right of action will depend upon the law of Illinois as it shall be shown to be. There is no inherent difficulty in finding out or applying the legal principles governing the cause of action in Illinois when the accident happened. The same objection was made in the case of *Walsh v. New York etc. Ry. Co.*, 160 Mass. 571, 39 Am. St. Rep. 514, and was overruled. We fully agree with what was there said by Holmes, J., in the opinion of the court: "As between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties." Thus far we go in the present case, and, going thus far, we hold that the trial court should have entertained and tried the case. As to the form of the remedy, the conduct of the trial, and the rules of evidence, the law of the forum would unquestionably prevail.

An Illinois statute of limitations was set up in the answer as a defense, but the statute was not offered in evidence. ⁸² Consequently, the question as to its effect upon the plaintiff's cause of action in this suit was not before the court below, is not before us, and hence is not decided.

By the Court. Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J. I fully concur in the reversal of the judgment in this case, and much that is contained in the opinion of my brother Winslow. The only question I desire here to consider is as to whether the plaintiff has the absolute right to bring and maintain this action under the clause of the constitution of the United States which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states": Const., art. 4, sec. 2.

The only case cited by counsel, or which any of us have been able to find, so holding, in a case similar to this, is *Cofrode v. Circuit Judge*, 79 Mich. 332, and in that case Mr. Justice Campbell dissented. Besides, that was a proceeding by mandamus to compel the court to entertain a case arising under a contract for the construction of a railroad in Michigan. That case was decided after Mr. Justice Cooley had left the bench. According to that learned author, the precise meaning of "privileges and immunities" is not as yet very conclusively settled: Cooley's *Constitutional Limitations*, 6th ed., 490. The supreme court of the United States—the final arbiter—has not, it would seem, determined the precise question suggested, although that court has many times considered the clause of the constitution mentioned. Mr. Story says: "The intention of this clause was to confer on them [citizens], if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances": 2 Story on the Constitution, sec. 1806. Mr. Hare says that "the clause in question adds nothing to the rights given ⁸³ and restraints laid by the other articles of the constitution, except that the rules made by each state with regard to the citizens of her sister states must be the same as those which she imposes on her own citizens": 1 Hare's *American Constitutional Law*, 513.

In *Paul v. Virginia*, 8 Wall. 180, Mr. Justice Field said: "But the privileges and immunities secured to citizens of each state in the several states by the provision in question are those privileges and immunities which are common to the citizens in the latter

states, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation except by the permission, express or implied, of those states." The definition thus given was sanctioned by Mr. Justice Miller in the Slaughter-House cases, 16 Wall. 76, 77, and he there added: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." Many similar expressions have emanated from the same tribunal.

In addition to the enforcement of the criminal laws and police regulations as to persons and property within the state, the principal functions of a state government would seem to be to make and enforce laws for and against its ⁸⁴ own citizens, and for and against property and rights of property located or having a situs therein. The party to such a controversy, although a nonresident and a citizen of another state, undoubtedly has the same "privileges and immunities" as a party who is a citizen of the same state; otherwise, the administration of the law would be partial and unjust. But, in my judgment, the case at bar does not come within the letter or spirit of the constitutional guaranty mentioned. Since this state has no power to authorize an action to be commenced and maintained by one of its own citizens against another of its own citizens, in the courts of any other state, in respect to a tort committed in this state, it necessarily follows that the courts of this state are not arbitrarily bound, by the constitutional provision quoted, to entertain jurisdiction of a suit commenced by one citizen and resident of Illinois against another citizen and resident or corporation of Illinois, when the only controversy is in regard to a tort committed in Illinois, unless that clause requires this state to grant "privileges and immunities" to citizens of other states which it has no power to grant to its own citizens "under the like circumstances." This, as shown, would be contrary to the authorities cited. To avoid such an anomaly, according to Mr. Story, the wording of the cor-

responding clause in the old articles of confederation was purposely changed to its present form: 2 Story on the Constitution, sec. 1805. Actions like the one at bar are generally governed by the principles of interstate comity: Cooley's Constitutional Limitations, 6th ed., 150, 151. This court has recently not only recognized but sanctioned such principles of interstate comity, in an opinion by Mr. Justice Pinney: *Gilman v. Ketcham*, 84 Wis. 60; 36 Am. St. Rep. 899. Thus, in *National etc. Mfg. Co. v. Du Bois*, 165 Mass. 117, 52 Am. St. Rep. 503, it is held that "to a foreign corporation having a place of business here, and suing a citizen of another state, the courts of equity in this commonwealth are not open as a matter of strict right, but as a matter of ⁸⁵ comity." In *Smith v. Mutual Life Ins. Co.*, 14 Allen, 336, it was held that "this court will not entertain jurisdiction of a bill in equity brought by a citizen of Alabama, who has never lived here, against an incorporated mutual life insurance company of New York, seeking to restore him to his rights under a policy issued by the defendants in New York upon his life, he having failed to pay the premiums required by the terms of the policy, although the defendants transact business in this commonwealth, and have appointed an agent resident here upon whom all lawful processes against the company may be served." To the same effect: *Bank of North America v. Rindge*, 154 Mass. 203; 26 Am. St. Rep. 240; *Kimball v. St. Louis etc. Ry. Co.*, 157 Mass. 7; 34 Am. St. Rep. 250; *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850. Numerous other cases might be cited to the same effect.

It may be conceded that an action for a tort to the person may generally be maintained in any jurisdiction in which the defendant can be legally served with process. It seems to be essential, however, that the wrong complained of, although actionable according to the law of the state where the action is brought, should also be actionable according to the law of the state or country in which it occurred or was committed: *Dicey on Conflict of Laws*, 667, and cases there cited. In actions at common law, this identity or similarity of law is assumed to exist in the absence of reasons to the contrary: *Dicey on Conflict of Laws*, 667; citing *Walsh v. New York etc. R. R. Co.*, 160 Mass. 571; 39 Am. St. Rep. 514. In statutory actions it is held that "if the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if, under our forms of procedure, an action here cannot give a sub-

stantial remedy, we are at liberty to decline jurisdiction": *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 180; 31 Am. St. Rep. 544, and cases there cited.

⁸⁶ In considering section 1 of article 4 of the constitution of the United States, Fuller, C. J., speaking for the majority of the court, said: "The constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory": *Cole v. Cunningham*, 133 U. S. 112; affirming *Cunningham v. Butler*, 142 Mass. 47; 56 Am. Rep. 657. He then said: "The intention of section 2 of article 4 was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New York, and have the full use and benefit of the courts of that state in the assertion of their legal rights; but, as that fact might affect the right of action as between them and the citizens of their own state, the courts of New York might have held that its existence put an end to the seizure of their debtor's property by Butler, Hayden & Co. in New York. If, however, those courts declined to take that view, it would not follow that the courts of Massachusetts violated any privilege or immunity of Massachusetts' own citizens in exercising their undoubted jurisdiction over them." The learned chief justice then goes on at great length, and shows by the citation of numerous adjudications that since the litigants were both citizens of Massachusetts, and subject to the jurisdiction of its courts, one of them might be restrained from prosecuting an action previously commenced in New York to collect a debt by garnishment therein. The opinion is replete with learning and authorities to the effect that, where both parties to the controversy are citizens and residents of the same state, one may restrain the other from prosecuting a suit against him in some other state, and in fraud of the laws of the state where they both reside. If the constitution of the ⁸⁷ United States gives to every party to a transitory action the absolute right to commence and maintain the same in any state of the Union where he can get service on the defendant, then it is difficult to perceive upon what theory they can be restrained from exercising such constitutional right. In several of the states a nonresident is required by statute to give security for costs as a condition precedent to commencing or maintaining a suit, when no such requirement is made of a resident plaintiff;

and the validity of such statutes have been sustained: *Reno on Nonresidents*, 44, 45. If such authorities are sound, then it is difficult to perceive how the right to bring and maintain the suit can be regarded as an absolute constitutional right. If the constitutional clause in question gave to the plaintiff the absolute right to commence and maintain this action, then it would seem that the state courts have generally, and for a century, labored under a grave misapprehension in holding that jurisdiction in such cases was governed by the principles of interstate comity.

This hasty expression of opinion is merely to indicate the grounds on which I differ from the opinion filed.

ACTIONS—TRANSITORY—JURISDICTION.—Generally speaking, injuries to personal property and to personal rights are of a transitory nature, and an action to recover may be brought wherever the defendant may be found and served. Hence, an action for injury to the person, done beyond the territorial limits of the state, is transitory, and may be maintained in the courts of another state: Monographic note to *Morris v. Missouri Pac. Ry. Co.*, 22 Am. St. Rep. 24, as to when actions are local and when transitory. See monographic note to *Alley v. Caspari*, 6 Am. St. Rep. 181; *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221; 45 Am. St. Rep. 528, and note.

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE. Fellow-servants are those who are so far working together as to be practically co-operating, and who have an opportunity to control, or influence the conduct of, and who have no superiority over, one another: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 438; 52 Am. St. Rep. 896, and note. See *Sims v. American etc. Barge Co.*, 56 Minn. 68; 45 Am. St. Rep. 451, and note.

When Transitory Causes of Action may not be Prosecuted in a Foreign State or Country.*

We have already in notes to this series of reports considered what actions are transitory and what local, and have therein attempted to state rules for the purpose of determining when a cause of action is local in the sense that it cannot be enforced by suit in the courts of a state or country other than that in which it arose, and when it is transitory in the sense that it is enforceable in the courts of states or nations other than those within whose limits the cause of action originated: Note to *Morris v. Missouri etc. Ry. Co.*, 22 Am. St. Rep. 22. This topic is necessarily connected with that of the jurisdiction of the courts of a state or nation over persons not resident therein.

* REFERENCE TO MONOGRAPHIC NOTES.

Jurisdiction of foreigners and their property: Note to *Molynaux v. Seymour*, 76 Am. Dec. 666-678.

Jurisdiction of torts on the high seas: Note to *Johnson v. Dalton*, 18 Am. Dec. 666.

Jurisdiction of the courts of one state or country over citizens of another: Note to *Alley v. Caspari*, 6 Am. St. Rep. 179-190.

Action in one state to enforce cause of action created by the statutes of another: Note to *Attrill v. Huntington*, 14 Am. St. Rep. 350-355.

Actions, when local and when transitory: Note to *Morris v. Missouri etc. Ry.*, 22 Am. St. Rep. 22-27.

Jurisdiction over absent citizens: Note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 191.

nor citizens thereof. That branch of the subject has also received such consideration that we shall not re-enter upon it: Notes to Alley v. Caspari, 6 Am. St. Rep. 179, and to Molyneux v. Seymour, 76 Am. Dec. 665. The subject we now propose to treat is more restricted than those already considered, and has been less frequently discussed by the courts, and, for that reason, it will be difficult to state with confidence conclusions applicable to some portions of it. In what we shall say we shall assume the bringing of actions in a state or country other than that in which the cause thereof had its origin, and that the parties interested have been brought before the court in some unexceptionable manner, and that the cause of action is transitory in the sense that if the court should proceed to judgment such judgment would not be regarded as void either for want of jurisdiction of the parties or subject matter, and shall inquire when, under such circumstances, the court in which the action is brought may decline to pursue its jurisdiction to a final judgment on the merits, and whether it so declines or not, the parties resorting to it may be enjoined from there further proceeding, by the courts of the state or country in which the cause of action is alleged to have arisen, and of which the parties thereto are residents.

Discretion to Decline Jurisdiction of a Cause of Action Arising in a Foreign Country.—There is no doubt that every state or country has jurisdiction over all persons found within its territorial limits for the purpose of actions in their nature transitory, and that it may obtain jurisdiction of such persons, with a right to pursue such jurisdiction to final judgment, in all cases where process is served within the territorial limits of the jurisdiction of the court issuing it: Smith v. Gibson, 83 Ala. 284; Roberts v. Dunsmuir, 75 Cal. 203; Insurance Co. of North America v. McLimas, 28 Neb. 653; Taylor v. Sharp, 108 N. C. 377; Gibson v. Everett, 41 S. C. 22; Ex parte Perry etc. Co., 43 S. C. 176; Stone v. United States, 167 U. S. 178. When a transitory cause of action has arisen within a foreign country, the courts of this are not obliged to entertain jurisdiction of it, though all the parties to the action happen to be within its limits. In other words, it is said that the courts have a discretion as to whether or not they will entertain such a transitory action. The limits of this discretion and the rules by which it shall be controlled are nowhere clearly stated. If the parties to the action, though at present in this country, remain citizens of that country wherein the cause of action arose, and have an intention of there returning, where there will be no impediment to a trial of an action upon the merits between them according to the laws of their own country, the courts of this may refuse to proceed. This rule was applied in an action brought by a seaman against the master of a foreign vessel for a tort alleged to have been committed on the high seas, and where it appeared that both the seaman and the master intended to return to the country of which both were residents, and where the seaman might prosecute his alleged cause of action in the courts of his own country: Gardner v. Thomas, 14 Johns. 134; 7 Am. Dec. 445; De Witt v. Buchanan, 54 Barb. 33; Mason v. Blaireau, 2 Cranch, 240. On the other hand, it has been held that in similar circumstances, where it did not appear

that the plaintiff intended to return to the country whence he came, that the courts of this country would take jurisdiction over his alleged cause of action, and pursue such jurisdiction to final judgment: *Pugh v. Gillam*, 1 Cal. 485; *Johnson v. Dalton*, 1 Cow. 543; 13 Am. Dec. 564. In *Mexican etc. Ry. Co. v. Jackson*, 89 Tex. 107, ante, p. 28, the supreme court of Texas held that the courts of that state would not entertain jurisdiction of a transitory cause of action commenced therein against the Mexican National Railway Company, a corporation of the republic of Mexico, for injuries alleged to have been suffered by the plaintiff while an employé of the defendant railway company in that republic through the negligence of its conductor and vice-principal. The grounds for refusing to entertain jurisdiction of the action were that many difficulties would present themselves in an attempt to determine the meaning of the Mexican law and in applying it in giving redress to the parties claiming under it, and that the courts of Texas might or might not give the same effect to language that is given to it in the courts of Mexico, and there would be no reasonable certainty that the rights of the parties would be adjusted in Texas as they would be if the case were tried in the courts of Mexico. The court said that: "The reason which influences the courts of one state to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign state or country, is that the defendant, having removed from such other state or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and, as a matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, but it would be unjust that the wrongdoer should be permitted, by removing from the country where he inflicted the injury, to avoid reparation for the wrong done him"; and the court reasoned that, as in the case before it, there had been no removal of the person or property of the defendant from the republic of Mexico, where the cause of action arose, and, as the defendant remained liable to suit in that country, there was no reason for permitting the action to be prosecuted in the courts of the state of Texas, and that if the courts of that state should be open to all persons who might be injured in Mexico in the management of the railway, it might seriously affect the means of commerce between that state and republic. Speaking of an action brought in Michigan to recover for a tort alleged to have been committed upon a railway in Canada, the supreme court of that state said: "There can be no doubt that the locality of the trespass does not of itself oust the jurisdiction, where the court has lawfully obtained control over the parties. But where the parties are not residents of the United States, and the trespass was committed abroad, the right to action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases. It is not to be denied that much hardship is likely to arise where a person is called upon to defend himself against a charge arising out of transactions occurring at a distance, and out of the jurisdiction. Witnesses cannot always be compelled or induced to be present at the trial, and where a knowledge of localities be-

comes essential, it is impossible to obtain a view by the jury. Questions of foreign law may, as in this case, become important elements of the decision. We think that when by the pleadings, or upon the trial, it appears that our tribunals are resorted to for the purpose of adjudicating upon mere personal torts committed abroad, between persons who are all residents where the tort was committed, the inconvenience and danger of injustice attending the investigation of such controversies render it proper to decline proceeding further. The cases cited on the argument recognized the right to take this course, and we regard it as the correct one": *Great Western Ry. Co. v. Miller*, 19 Mich. 305. We apprehend from the few meager decisions upon the subject that every court has discretion to refuse to entertain jurisdiction of a transitory action, the cause of which arose in a foreign country, when it appears that there is no reason why the parties interested may not resort to the tribunals of that country, and especially where there may be danger that in entertaining such an action, the courts will not determine the rights of the parties as they would have been determined in the courts of the nation where the cause of action arose. It is an undoubted principle of the law that the rights of the parties in such circumstances ought to be determined by the laws of the country wherein the cause accrued, and therefore that the courts of this country will decline jurisdiction when they feel a difficulty in construing those laws. It has been held that a party suing in a foreign country ought not to be awarded any remedy of a substantial nature to which he would not have been entitled had he and his adversary not removed to such foreign country, and hence if, in his own country, the plaintiff were not entitled in pursuing his cause of action, to arrest or imprison the defendant, such arrest or imprisonment ought to be denied in the country in which the suit was brought, and that such arrest might therefore be enjoined, or, if made, might be discharged on motion by the court in which the action was pending: *Talleyrand v. Boulanger*, 3 Ves. 447; *Melan v. Fitzjames*, 1 Bos. & P. 188.

As Affected by Treaties with Foreign Nations.—Under the provisions of article 6 of the constitution of the United States declaring, "All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." It is competent for the United States, under a treaty with a foreign nation, to deprive all the courts of this country of jurisdiction of a cause of action alleged to have arisen outside of the United States and against a citizen of such foreign country. This power has not, so far as we are aware, been exercised except with respect to controversies between the captains and crews of foreign vessels. Thus, there are provisions in the treaties between the United States and Denmark, Italy, Norway and Sweden, The Netherlands, Germany, Prussia, and perhaps other foreign nations declaring, in substance that the consuls, vice-consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right as such to sit as judges and arbitrators in such differences as may arise be-

tween the captains and crews of vessels belonging to the nations whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or the captain should disturb the order or tranquility of the country, or the said consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect, but that the parties have the right to resort, on their return, to the judicial authority of their own country. The jurisdiction thus vested in these foreign officials is, as to its subject matter, exclusive, and necessarily leaves our courts, whether state or national, without any jurisdiction whatever of controversies of the character designated in these treaties: *The Elwine Kreylin*, 9 Blatchf. 438; *the Salomoni*, 29 Fed. Rep. 534; *The Burchard*, 42 Fed. Rep. 608; *The Marie*, 49 Fed. Rep. 286; *Tellefsen v. Fee*, 168 Mass. 188; 60 Am. St. Rep. In controversies of this character, the citizenship of the plaintiff is not material. He must be denied relief, if he has voluntarily become one of the crew of a vessel of a foreign nation, though he is a citizen of the United States: *The Welhaven*, 55 Fed. Rep. 80; *The Marie*, 49 Fed. Rep. 287. Perhaps, if the action by a member of the crew against the captain is for barbarous and malicious assault committed while the vessel is in one of our ports, the case does not fall within the protection of the treaty, and our courts may assume jurisdiction: *The Salomoni*, 29 Fed. Rep. 534. Perhaps, also, a district court of the United States may take jurisdiction of an action by the crew of a foreign vessel against the vessel or its master, if there is no consul or other officer of the nationality of such foreign vessel within the territorial jurisdiction of the court: *The Amalia*, 3 Fed. Rep. 652. If an action is, in fact, commenced by one of the crew of a foreign vessel against the master, and a writ is issued purporting to authorize an arrest, and, before its execution, the officer charged with its execution is informed that the case is one falling within the treaty and that the claim of the plaintiff would be adjusted at the consulate of the nation, such officer is bound to know the law and that he has no right to proceed with the service of the writ, by making an arrest which it purports to authorize, and, if he does so, is liable to an action therefor: *Tellefsen v. Fee*, 168 Mass. 188; 60 Am. St. Rep.

Discretion to Decline Jurisdiction of a Cause of Action Arising in a Sister State.—Whether a court of one of the United States has discretion to refuse to entertain jurisdiction of a transitory cause of action arising in another state under the same circumstances in which it might refuse to entertain jurisdiction had such cause of action arisen in a foreign country is a question which, though judicially considered, has perhaps, not yet been definitely and finally determined. A comparatively recent decision in the supreme court of Michigan has been cited as authority for the position that under section 2 of article 6 of the constitution of the United States, declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," a court of that state is prohibited from declining jurisdiction of any action brought therein by a citizen of the United States, whether the cause

thereof arose within the state or not. The court did, indeed, say "If a party has a right to plant his suit in the circuit court of this state, the circuit judge has no discretion to exercise in the matter. He cannot say to one, 'I will retain your suit,' and to another, 'I will dismiss it.' It is among the fundamental rights of a people under our government that they may be secure in the acquirement, possession, and enjoyment of property, and for this purpose courts are instituted as part of the organic law, in which every person shall have his remedy by due process of law. It is secured as a privilege to which every citizen of the United States is entitled. The redress of wrongs and the means of enforcing contracts are of the greatest consequence to the citizens of every state"; and further: "A citizen of another state can come into this and acquire and enjoy property. He may inherit and transmit property. He may enter into contracts to the same extent that a citizen of this state can do so, and in this his rights are guaranteed by the above provision of the constitution; and I think that his right to bring suit in this state in any case where a citizen of the state may is also guaranteed and protected by this provision of the constitution. This right does not depend upon the fact of the defendant's having property in this state which can be reached by execution. There are many cases where, in a suit between citizens of this state, there can be no property out of which to satisfy an execution; nevertheless, the plaintiff has a right to plant his suit, litigate his claims, and obtain judgment": *Cofrode v. Gartner*, 79 Mich. 332. It should be remembered, however, that his language was employed in an opinion directing the granting of a writ of mandamus to compel a judge of a state court to place a case therein pending upon the calendar of the court for trial, the same having been stricken from such calendar on the ground that all the parties to the action were nonresidents. The cause of action itself, however, was one arising out of a contract for the building of a railway within the state, and the action of the trial judge seems to have been based upon the theory that the cause of action had arisen in a county different from that in which the suit was brought, and the trial of the action in the latter county would involve it in great expense in a matter wherein it had no interest either in the parties or in the subject matter, and his object was not to exclude the plaintiff from the courts of the state, but merely to compel him to resort to the courts of the county or district which he thought ought to bear the burden of the trial. Though the cause of action was transitory, it was one arising within the state of Michigan, and might be prosecuted there more appropriately than elsewhere, and the language of the opinion, so far as it tended to sustain the conclusion that a court of a state may not decline jurisdiction of a transitory action, the cause of which arose in another state, may be regarded as a dictum. In fact, conceding that a court has discretion upon this subject, there was nothing in this case warranting its exercise, for not only did the cause of action arise within the state, but it was one wholly controlled by its laws, and none of the reasons sometimes advanced for declining jurisdiction existed.

The legislature of the state of New York, by section 427 of its Code of Procedure, has, in effect, declared that actions against corporations created in another state or country may be brought in the courts of New York, either by residents of the state or by nonresidents thereof, "when the cause of action shall have arisen, or the subject matter of the action shall be situate, within the state." It was contended that this section, in so far as it excluded from the courts of the state nonresident plaintiffs suing foreign corporations upon causes of action which did not arise within the state, was in conflict with the section of the national constitution already quoted, guaranteeing to citizens of each state the privileges and immunities of citizens in the several states. This claim has, however, been denied by the court of appeals of that state: *Robinson v. Ocean etc. Co.*, 112 N. Y. 315. In a later case, which was an action for criminal conversation in another state, both parties still being residents of that state when the action was commenced in New York, the defendant appeared in the cause, made no objection to the jurisdiction of the court until the close of the trial, when he requested the court to charge that the action could be maintained only in the state wherein the cause thereof arose. This request was refused, but the court intimated that, as the defendant had not left his place of residence in Pennsylvania, where he and the plaintiff resided, nor removed any of his property therefrom when the action was begun there appeared no sufficient reason for prosecuting it in the courts of New York, and that if the defendant had raised by his answer or by special motion the question, the supreme court might, "in the exercise of its discretion, have refused to entertain the action or dismissed it on its own motion. Yet the defendant, not being entitled to a dismissal as a matter of right, ought not to be permitted to lie by until the close of the trial, when its probable result could be inferred, and then successfully invoke the exercise of the dis-
-quate in the courts of his domicile: *Ferguson v. Neilson*, 11 N. Y. 420. In several cases in the subordinate courts of New York they have refused to proceed, upon timely objection by the defendant, on the ground that both parties were residents of another state in which the cause of action arose, and the remedies of the plaintiff were adequate in the courts of his domicile: *Ferguson v. Nielson*, 11 N. Y. Supp. 524; *Burdick v. Freeman*, 46 Hun, 138; *Molony v. Dowes*, 8 Abb. Pr. 316. The principal case also proceeds, in the opinion of the majority of the court, upon the ground that the constitution of the United States gave the plaintiff an absolute right to bring his action in the court of any state of the Union, though neither he nor the defendant was a resident of that state, and no reason was disclosed for not pursuing the defendant in the state of which both parties were residents. In our judgment, in so far as the court intimated that the plaintiff had an absolute right to maintain the action in the state, and that the trial court had no discretion to refuse to proceed with it, the opinion of the court cannot be sustained either upon reason or precedent, nor are we inclined to its view that the discretion of the trial court, if it existed, had been improvidently exercised.

The courts of a state will not entertain jurisdiction of a suit against a corporation of another state, if the adjudication which might be made would depend for its enforcement upon the courts of the other state, and they may say that the courts of this state had mistaken the laws of the other state: *Kimball v. St. Louis etc. Ry.*, 157 Mass. 7; 34 Am. St. Rep. 250.

If a suit is pending in a state respecting land situated therein, and the courts thereof are in a situation to do justice to all the parties, the courts of this state will refuse to entertain jurisdiction of a cause, where it has not jurisdiction of all the necessary parties, and will leave the parties to the decision of the courts of the other state. Hence, in a suit begun in Illinois to have the defendants declared to be trustees, and to hold as such certain mining property in Colorado, and for an accounting concerning the same, and for an injunction against interference therewith, in which it appeared that there were certain mortgagees of whom the court had not jurisdiction, it decided not to proceed with the action, but to require the plaintiff to resort to the courts of Colorado, wherein the property was situate, and where, in a suit already pending, jurisdiction might be procured of the mortgagees and of all parties in interest, and a judgment rendered, the effect of which none of them could deny for want of jurisdiction of their persons: *Harris v. Pullman*, 84 Ill. 20; 25 Am. Rep. 416.

The courts of Texas are inclined to refuse jurisdiction of a transitory action, the right to maintain which does not rest upon the common law and is dependent solely upon the statutes of another state: *Texas etc. Ry. Co. v. Richards*, 68 Tex. 375; *St. Louis etc. Ry. Co. v. McCormick*, 71 Tex. 660; *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17; 22 Am. St. Rep. 17. Upon this question there is a considerable conflict of authorities, but we have already shown in the note to *Attrill v. Huntington*, 14 Am. St. Rep. 353, that while a state will not usually enforce in its courts a penalty imposed by the statutes of another state, yet it will enforce a cause of action not in the nature of a penalty arising under a statute of another state, which statute is not inconsistent with the statutes or policy of the state in which the action is brought. Where it is claimed that a state court ought to decline jurisdiction of a transitory action the cause of which arose in another state, on the ground that there is a difference between the laws of the two states, such jurisdiction will not ordinarily be declined because of such difference, nor because it might possibly happen that the prosecution of the action in one state may result in a judgment different from that which might have resulted from its prosecution in the other. In other words, as we understand the decisions, a state court will not decline jurisdiction of a transitory action upon the mere suggestion that there is a difference between the laws of the state in which the cause thereof arose and the laws of the state in which the action is prosecuted, and that the court may have some difficulty in interpreting the laws of the other state, and may possibly reach a conclusion respecting them which might not have been reached by the courts of the state in which they were.

enacted: *Eingartner v. Illinois Steel Co.*, 94 Wis. 70; ante, p. 859; *Carson v. Dunham*, 149 Mass. 52; 14 Am. St. Rep. 327; *Walsh v. New York etc. Ry. Co.*, 160 Mass. 571; 39 Am. St. Rep. 514; *Dennick v. Railroad Co.*, 103 U. S. 11.

Some of the states are inclined to assert that the right of a corporation to prosecute an action in a state other than that of its domicile is not absolute and is recognized as a matter of comity only, and that the courts of that state have a discretion to refuse to entertain such an action, which they might not have if the action, though of a similar character, were brought by a nonresident natural person. Thus, in a suit begun in Massachusetts by a New Hampshire corporation upon a claim for labor, materials, and disbursements, performed, furnished, and made in Pennsylvania, and in which it appeared that the principal defendant was a resident of Pennsylvania, having no property in Massachusetts other than his interest as a partner in a firm whose property was, with some slight exceptions, in the state of his residence, and whose business was there carried on, the court declined jurisdiction; because the amount of the claim was small, the debt had been contracted, if at all, in another state, and it was manifest "that the principal defendant will be subjected to great and unnecessary expense to compel him to come here, and that the investigation required to ascertain his interest will be surrounded with difficulties which will be avoided without any apparent hardship to the plaintiff, if it brings its suit in Pennsylvania." The court further said: "If it appears that complete justice cannot be done here, or the amount is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and that the investigation required will be surrounded, if conducted here, with many and great, if not insuperable, difficulties, which will be avoided without additional hardships to the plaintiff, if suit is brought against the defendant in the state wherein he lives and where the alleged debt was contracted, and where personal service can be made on him, we think our courts should decline to take jurisdiction": *National etc. Co. v. Du Bois*, 165 Mass. 117; 52 Am. St. Rep. 503.

An attempt has been made to exclude from the rule that a transitory action may be prosecuted in any state wherein jurisdiction may be obtained of the defendant those cases in which both the plaintiff and a defendant corporation are nonresidents of the state in which the action is brought; but the courts are not inclined to allow any exemption in favor of nonresident corporations, and will entertain jurisdiction of actions against them as freely as if they were natural persons. An action may, therefore, be maintained in Mississippi, by a citizen of Illinois against a corporation of the same state for a tort committed by the latter in Illinois: *Pullman v. Laurence*, 74 Miss. 782; *New Orleans etc. Ry. v. Wallace*, 50 Miss. 244; *Chicago etc. Ry. Co. v. Doyle*, 60 Miss. 997; *Illinois etc. Co. v. Cradup*, 63 Miss. 201; *Burns v. Grand Rapids Ry.*, 113 Ind. 169; *Knight v. West Jersey Ry. Co.*, 108 Pa. St. 250; 56 Am. Rep. 269. This question is one much influenced by the statutes of the state in which it arises. There is probably no constitutional ob-

jection to statutes authorizing the courts of a state to assume jurisdiction over foreign corporations upon whom service of process may be made within the state. There is, however, in our judgment, a manifest propriety in construing statutes upon this subject as designed to afford citizens of the state a remedy in its courts against nonresident corporations upon causes of action arising therein; and a clear impropriety in so construing such statutes as to invite a resident of a state wherein a cause of action in his favor is alleged to have accrued to become, as it were, a fugitive from justice as administered by the courts of the domicile of himself and of his adversary; and those courts act most wisely which leave him to seek redress in such circumstances in the courts of the state of his domicile, in the absence of any showing of some obstacle in that domicile rendering the remedy there less adequate than in the foreign state: *Central etc. Co. v. Carr*, 76 Ala. 388; 52 Am. Rep. 339; *Morris v. Missouri etc. Ry. Co.*, 78 Tex. 17; 22 Am. St. Rep. 17; *Camden etc. Co. v. Swede etc. Co.*, 32 N. J. L. 15; *Gregory v. New York etc. Co.*, 40 N. J. Eq. 38; *Robinson v. Oceanic etc. Co.*, 112 N. Y. 810.

Cases Barred by a Foreign Statute of Limitations.—In the principal case, the statute of limitations of the state in which the cause arose was pleaded, but was not offered in evidence. Hence the court did not determine what would have been its effect had it been so offered, and it appeared therefrom that, before the commencement of the action in Wisconsin, it had been barred by the statute of limitations of Illinois, of which both parties were residents. If it be true, as stated in the principal case, that the right to sue in any state upon a transitory cause of action is guaranteed to every citizen of the United States, irrespective of the state wherein the cause of action accrued and of the residence of the parties, and that the court in which the action is brought has no discretion except to proceed with its trial, then it must necessarily follow, except where the title to property is involved and the statute of limitations has created a prescriptive right thereto, or where the statute of limitations of the state in which the cause of action arose purports to extinguish the right of action: *Story on Conflict of Laws*, secs. 582, 582 b; *Brown v. Brown*, 13 Ala. 208; 48 Am. Dec. 52; that the court must entertain the action regardless of the lapse of time, unless its prosecution is barred by the statutes of the state in which the court sits; for the decisions, while not absolutely unanimous, are substantially to the effect that the statute of limitations of the forum must control, and that an action, though not barred where the cause thereof arose and the parties resided, may, nevertheless, be barred by the law of the forum, and, on the other hand, although barred by the law of the state where it arose and in which both parties reside, it is not barred by the laws of the forum, except when those laws operate alike upon causes arising without and those arising within the state: *Bulger v. Roche*, 11 Pick. 36; 22 Am. Dec. 359, and note 362-366; note to *Moore v. Armstrong*, 36 Am. Dec. 73; *Story's Conflict of Laws*, secs. 576-583. In many of the states, the statute of limitations does not operate in fa-

vor of nonresidents. Hence, it must happen that a nonresident, temporarily in a state, may be subject to action upon a cause alleged to have arisen against him in the state of which he and the plaintiff are both residents, though it has long been barred by the statutes of that state. There may, perhaps, be cases in which, though the statute of limitations of the domicile of the parties has precluded all further remedy therein, the prosecution of an action in another state cannot be adjudged to be inequitable: *Thorndike v. Thorndike*, 142 Ill. 450; 34 Am. St. Rep. 90. But we shall hereafter show that the prosecution of an action in another state or country for the purpose of procuring relief to which the plaintiff is not entitled in the state of his domicile and the defendants may be enjoined, and this rule ought to be applicable where the apparent object of proceeding in another state is to avoid the statute of limitations of the domicile of the parties. It would seem that where sufficient cause exists for enjoining the plaintiff from proceeding with a suit or action, that cause, if called to the attention of the court in which the action is pending, ought to constitute an adequate defense thereto, or, at least, a sufficient ground to warrant its declining to proceed further with the controversy, leaving the parties to vindicate their rights and assert their defenses in the courts of their own state or country.

Injunctions against Prosecuting Actions in Another State or Country.—The courts of every state and nation have jurisdiction of the citizens thereof resident therein, and may, in the lawful exercise of that jurisdiction, enjoin them from prosecuting a suit or action in another state or country. An injunction issued in the exercise of this authority is not regarded as an interference with the tribunals of the other state or nation. It merely operates in personam against the persons enjoined from so proceeding, and subjects them to such punishment as the court may visit upon persons over whom it has jurisdiction, for the violation of its commands. That a court of a nation may enjoin a resident citizen thereof from prosecuting an action or other judicial proceeding in the judicial tribunals of another nation, though at one time doubted (*Love v. Baker*, 1 Cas. Ch. 67; 2 Freem. 125), has long been an established principle of English jurisprudence: *McIntosh v. Ogilvie*, 4 Term Rep. 193, note; 3 Swanst. 365, note; 1 Dick. 119; *Bushby v. Munday*, 5 Madd. 297; *Portarlington v. Soulby*, 3 Mylne & K. 104; *Story's Equity Jurisprudence*, secs. 899, 900. "Although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act in personam upon those parties, and direct them by injunction to proceed no further in such suit. In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court; but, without regard to the situation of the subject matter of dispute, they consider the equities between the parties and decree in personam according to those equities, and enforce obedience of their decrees by process in personam": *Story's Equity*

Jurisprudence, sec. 800; Wharton v. May, 5 Ves. 27, 71; Harrison v. Gurney, 2 Jac. & W. 503; Beauchamp v. Marquis of Huntley, Jac. 546.

It was at one time contended that, under the provisions of sections 1 and 2 of article 4 of the constitution of the United States, declaring that full faith and credit should be given in each state to the public acts, records, and judicial proceedings of every other state, and that the citizens of each state should be entitled to all privileges and immunities of citizens of the several states, every citizen of the United States had the absolute right to prosecute an action in the courts of any state of the United States, and, therefore, that an injunction could not issue from a court of the state of his domicile forbidding him to exercise this right in the courts of another state. It is now, however, well established by the decisions, both state and national, that these constitutional prohibitions do not lessen the authority of the judicial tribunals of a state over its resident citizens, and that those tribunals may, therefore, by injunction, prohibit one of such residents from prosecuting another in the courts of another state: *Cole v. Cunningham*, 133 U. S. 107. It may, therefore, with confidence, be affirmed that the courts of one state may enjoin the prosecution of a judicial proceeding in another state upon substantially the same grounds that the courts of one nation may enjoin the prosecution of a suit or action in the courts of another nation. It will be found, upon an examination of the decisions upon this subject, that it is not necessary, in order to obtain relief, to establish the usual grounds for equitable interposition, namely, fraud, accident, or mistake, but that it will be sufficient to entitle a citizen of a state to injunction preventing another citizen thereof from prosecuting an action against the former in the courts of another state to show that the purpose or necessary effect of such action is to obtain an advantage to which the plaintiff therein is not entitled in the domicile of the parties: *Pickett v. Ferguson*, 45 Ark. 177; 55 Am. Rep. 545; *Clafflin v. Hamlin*, 62 How. Pr. 284. If a contract has been entered into between residents of a state, which one of the parties thereto claims he is entitled to have canceled, and the other party brings an action thereon in the courts of another state, the defendant in that action is not obliged to go into the other state for the purpose of assailing the contract and showing the existence of facts entitling him to its cancellation, but he may proceed in the courts of the state in which both parties have their domicile and protect himself against vexatious litigation under the contract by procuring an injunction against the further prosecution of the action in the other state thereon: *Sandage v. Studebaker etc. Co.*, 140 Ind. 143; 51 Am. St. Rep. 163.

Injunction against Suits Interfering with Bankruptcy Proceedings.—In some instances an assignment in insolvency or for the benefit of creditors is not operative beyond the state in which it is made, and in those cases it has been held that a creditor of the insolvent may, notwithstanding his voluntary assignment or compulsory proceedings against him, sue him in another state and subject his property found therein to attachment or execution: *Paine v. Lester*, 44 Conn.

196; 26 Am. Rep. 442; Warner v. Jaffray, 93 N. Y. 248; 48 Am. Rep. 616. But the better opinion is, that as to residents within the state where the assignment is made and where it, though voluntary, is operative, neither of them will be permitted, by proceedings in another state, to obtain an advantage over the other creditors: Woodward v. Brooks, 128 Ill. 222; 15 Am. St. Rep. 104; Bacon v. Horne, 123 Pa. St. 452; Gilman v. Ketcham, 84 Wis. 60; 36 Am. St. Rep. 899. Where, however, the statutes of a state or country authorize proceedings in insolvency by or against a debtor, the result of which is the transfer of all his property subject to execution to an assignee or receiver, which transfer also has the effect of annulling preferences made or obtained in anticipation of insolvency and of enabling all the creditors within the state to share in the distribution of the assets of the insolvent, the courts of the state or country may enjoin a resident creditor from proceeding with actions commenced elsewhere for the purpose of obtaining an advantage or preference over other creditors, whether such actions were begun after the commencement of the insolvency proceedings or before that date, in anticipation of the commencement of such proceedings and for the purpose of enabling the creditor to appropriate to the satisfaction of his debt more than his just share of the assets of the insolvent: Dehon v. Foster, 4 Allen, 545; 7 Allen, 57; Cunningham v. Butler, 142 Mass. 47; 56 Am. Rep. 637; Cole v. Cunningham, 133 U. S. 107; McIntosh v. Ogilvie, 3 Swanst. 365; Ex parte Tait, L. R. 13 Eq. 811.

Enjoining Suits in Other States after the Appointment of a Receiver.—If a receiver is appointed in a suit and authorized to take possession of, or to collect, the assets of the defendant or some other party to such suit, any subsequent interference with such assets is unauthorized, and may be regarded as a contempt of the court, though they are not situated within the state or nation whose court has granted the receivership. If a resident of that state undertakes, by a proceeding elsewhere, to collect, or obtain possession of, such assets, or any part thereof, he may be punished as for a contempt of court, and this punishment may sometimes extend to persons who are not residents of the state, as where, though nonresidents, they are attorneys of one of the parties to the action and are attempting in another state to subject the property of the party for whom a receiver has been appointed to the payment of moneys alleged to be due them for their services in the suit: Chafee v. Quidnick Co., 13 R. I. 442. The remedy of attachment and punishment for contempt is not exclusive. An injunction may properly issue restraining any resident of the state or country where the receiver has been appointed from proceeding in another state or country to collect moneys or other assets to which the receiver is entitled: Vermont etc. Co. v. Vermont Central R. R. Co., 46 Vt. 792; Langford v. Langford, 5 L. J. Oh., N. S., 60. The injunction may issue though the person against whom it issues is acting as the agent of a resident of another state. Thus, where a proceeding was commenced in a court of Illinois, and

a receiver appointed of all the property and effects of the defendants and thereafter an agent, residing in Illinois, of a corporation organized under the laws of Connecticut caused an action to be commenced in favor of that corporation in the District of Columbia, and property of the defendants, for whom a receiver had been appointed, to be attached in that district, the court, upon proceedings in the original suit, brought this agent before it and made an order directing that he dismiss the suit thus instituted by him, and, on his failure to do so, entered a judgment punishing him for contempt. Such judgment was sustained upon appeal, and it was said that the act of going beyond the jurisdiction to reach the property was as much an interference with the receiver as if the property had been situated in the state in which he was appointed: *Sercomb v. Catlin*, 128 Ill. 556; 15 Am. St. Rep. 147. Where a receiver has been appointed in a state, and an injunction issued against the interference with property subject to his receivership, and a resident creditor against whom such injunction is operative nevertheless institutes a suit in another state, seeking to collect a debt, the courts of such other state will not permit him to thus evade the laws of his domicile, and will deny him relief: *Bacon v. Horne*, 123 Pa. St. 452; *Gilman v. Ketcham*, 84 Wis. 60; 36 Am. St. Rep. 899.

Injunction against Actions to Avoid the Effect of Pre-existing Suits. If a suit or action is already pending in a court of a state or nation between residents thereof, and one of them subsequently institutes in a court of another state or nation another action against his adversary, involving the same questions as the first action, and where in the first action there is no impediment to the doing of complete justice between the parties and the granting to either of any relief to which he is entitled, the party who institutes the proceedings abroad is regarded by the English court of chancery as doing something for the purpose of vexing and harassing his adversary, and will, therefore, be restrained by it from further prosecuting his action or proceeding in the foreign country: *Maclaren v. Stainton*, 16 Beav. 279; *Carron etc. Co. v. Maclaren*, 5 H. L. Cas. 416; *Harrison v. Gurney*, 2 Jac. & W. 502; *Beckford v. Kemble*, 1 Sim. & S. 7. There is no reason why the same rule should not apply to a party to an action in the state of his residence who subsequently commences another and apparently unnecessary action in another state. He will, therefore, be enjoined from proceeding with such action, if it appears that the first is effectual to determine the whole controversy: *Field v. Holbrook*, 3 Abb. Pr. 377; and an additional ground for interference by injunction is presented when it appears that the action is brought in the other state because the adverse party will there be subjected to great difficulty and inconvenience, and may, perhaps, not be able to present his cause or defense upon the merits, as where the witnesses upon whom he relies reside in the state where the first action was commenced, and his pecuniary ability is not such that he will be able to procure their

testimony and present it to the court in which the second action was brought: *Kittle v. Kittle*, 8 Daly, 72.

Injunction against Suits in Other States to Evade the Exemption Laws.—While the statutes exempting the property of debtors from attachment and execution are universally regarded as parts of the *lex fori*, and for that reason a debtor cannot, as against a writ issued in any state, maintain a claim for any other exemption than that allowed by the laws of such state, although he is not a resident thereof, and the cause of action arose in another state, of which he was a resident and by whose laws he might maintain the exemption which he claims, yet it is conceded that where a debtor and creditor are residents within the same state, the latter may be enjoined by the courts of the state of their common residence from resorting to the courts of another state for the purpose of evading the exemption laws of the state of their domicile and subjecting property to execution or attachment which is not subject thereto by the laws of such domicile: *Freeman on Executions*, sec. 200; *Allen v. Buchanan*, 97 Ala. 399; 36 Am. St. Rep. 687; *Griffith v. Langsdale*, 53 Ark. 71; 22 Am. St. Rep. 182; *Wilson v. Joseph*, 107 Ind. 490; *Teager v. Landsley*, 69 Iowa, 725; *Hager v. Adams*, 70 Iowa, 746; *Zimmerman v. Franke*, 84 Kan. 650; *Burlington etc. Ry. Co. v. Thompson*, 81 Kan. 180; 47 Am. Rep. 497; *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448; *Wabash etc. Ry. v. Siefert*, 41 Mo. App. 35; *Snook v. Snetzer*, 25 Ohio St. 516; *Moton v. Hull*, 77 Tex. 80; *Griggs v. Doctor*, 89 Wis. 101; 46 Am. St. Rep. 824. It is not material that the debtor happens to be temporarily within a state other than that of his residence and has taken with him property which is there subject to execution, but is not subject to execution by the laws of his domicile. His taking the property into another state for a temporary purpose will not be regarded as a waiver of his right to exemption within the state of his domicile as in favor of a creditor also domiciled in that state: *Mumper v. Wilson*, 72 Iowa, 163; 2 Am. St. Rep. 238. If an injunction should issue against the sale of exempt property in such circumstances, and the creditor, in defiance of it, should afterward proceed to subject the property to his execution, an action may be maintained against him by his debtor in the courts of the state of their domicile to recover the value of such property: *Stewart v. Thomson*, 53 Am. St. Rep. 431.

Injunctions to Prevent Suits in Another State to Avoid Agreements.—A plaintiff will be enjoined from prosecuting an action in a state other than that of the residence of himself and the defendant, where his object in doing so is to violate or evade a valid agreement entered into by him. Thus, if he has made an agreement not to bring an action in another state to partition lands situated therein, he may be enjoined from maintaining an action in violation of such agreement: *Bowers v. Durant*, 43 Hun, 848. One who enters into a contract with a common carrier, containing a limitation of the liability of the latter valid under the laws of the state in which it is entered into, will not be permitted to maintain a suit in another state for the purpose

of taking advantage of the decisions of its courts holding that an exemption from liability of this character is unlawful and unenforceable: *Dinsmore v. Neresheimer*, 32 Hun. 204.

Enjoining Suits in Another State to Obtain Relief not Warranted by the Laws of the Domicile of the Parties.—The general rule is stated in many of the decisions, and its existence is, we believe, nowhere expressly denied, that a person will be enjoined from proceeding in the courts of another state or nation where the object of resorting to them is to obtain some advantage not allowed to him by the laws of the state of which both he and the defendant are residents. Hence, if a chattel mortgage on railway rolling stock is valid in the state in which it is executed, a creditor residing in that state will not be permitted to maintain a suit in another state wherein the chattel mortgage is not valid, for the purpose of obtaining a lien by attachment on mortgaged chattels there situate: *Vail v. Knapp*, 49 Barb. 299. Upon a bill in equity alleging that there were certain gambling transactions in stocks between the plaintiff and the defendants, by which the former became indebted to the latter, that by the laws of the state in which these transactions took place they were void, that the defendants, for the purpose of evading those laws and obtaining an oppressive and inequitable advantage, and also for the purpose of evading the provisions of the constitution of the state forbidding imprisonment for debt, commenced a suit in another state upon false statements of fact against the plaintiff, under which he was arrested and imprisoned, it was held that these allegations entitled the plaintiff to an injunction against the further prosecution of the action in the state of New York, and furthermore that the fact that one of the parties against whom the suit was instituted in New York was a resident of that state, did not deprive the court of Maryland of jurisdiction to restrain the further prosecution of the action. The court stated the general rule controlling its action as follows: "The authorities show that equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice, or unconscientious advantage, and most especially where there is an attempt to evade or defeat the operation of the laws of the state where both parties to the suit reside. The transactions in this case all occurred in the city of Baltimore; the parties to this controversy are all citizens and residents of that city; the evidence would naturally be there, and readily obtainable; and courts are established there with jurisdiction competent to determine the rights of the parties according to the law of Maryland, of which they have judicial knowledge. The complainant is subjected to prosecution before a tribunal of another state which must ascertain the law through imperfect methods of proof, where there must be much difficulty and expense in obtaining the evidence of the witnesses, and where the legal processes have features of severity and hardship from which citizens of Maryland are protected by the constitution of the state": *Miller v. Gittinga*, 85 Md. 601; 60 Am. St. Rep.

Injunction against Actions Barred by the Statute of Limitations.—After considering the declaration of the general principle so often made in the decisions, that a resident of a state will not be permitted to resort to the courts of another state or country for the purpose of obtaining therein an advantage not obtainable in the state of which both he and his adversary had their domicile and in which his cause of action arose, we should naturally expect that if in that state its statute of limitations had operated so as to completely bar all further judicial remedy therein upon a cause of action, that he would not be permitted to resort to the courts of another state or country for the purpose of avoiding such bar. It is true that the statutes of limitation, except where they purport to absolutely extinguish a right or to confer a title by prescription, are universally regarded as parts of the *lex fori*: Wood on Limitations, secs. 8, 9; Bulger v. Roche, 11 Pick. 36; 22 Am. Dec. 359, and note; Goetz v. Voellinger, 89 Mass. 504. This, however, ought by no means to be conclusive of the question we are now considering, for we have already shown that statutes exempting property from execution are also regarded as parts of the *lex fori*, but that creditors may, nevertheless, be enjoined from proceeding in the courts of another state for the purpose of evading the force of these laws. The only case, however, which we have been able to discover in which the precise question we are now considering appears to have been involved and determined is that of Thorndyke v. Thorndyke, 142 Ill. 450; 34 Am. St. Rep. 90. This was a suit in which it was sought to enjoin a citizen of Illinois from prosecuting in another state an action at law against the estate of a deceased citizen of Illinois on the ground that the cause of action was barred by the statute of limitations of Illinois, though not barred by the statute of the state in which the suit sought to be enjoined was being prosecuted. The court determined that the relief sought should not be granted, saying: "No case has been cited, and we are aware of none, holding that it is inequitable for a party to prosecute a legal demand against another within any forum that will take legal jurisdiction of the case merely because that forum will afford him a better remedy than that of his domicile. To justify equitable interposition in a case like the present, it must be made to appear that an equitable right will otherwise be denied the party seeking relief." The assumption that there are no decisions denying the right to a remedy in a foreign country not permitted by the law of the domicile of the parties is, as we have already shown, not warranted: Talleyrand v. Boulanger, 3 Ves. 447; Melan v. Fitzjames, 1 Bos. & P. 188; Miller v. Gettings, 85 Md. 601; 60 Am. St. Rep.

EARLES v. WELLS.

[94 WISCONSIN, 285.]

MUNICIPAL INDEBTEDNESS, WHAT IS.—An agreement between a municipality and a partnership that the latter may construct a system of waterworks and issue bonds thereon for an amount specified, and that upon such construction to the satisfaction of the municipality, it will lease and operate such works, paying an annual rental for a period designated, at the end of which the works shall become the property of the municipality without any further payment or transfer, is but an indirect mode of creating an indebtedness against the municipality, and is void if the sums so agreed to be paid, added to the existing indebtedness, exceed the amount of liability which the city is permitted to incur.

MUNICIPAL INDEBTEDNESS. CONSTITUTIONAL PROHIBITIONS OF.—The moment an indebtedness is voluntarily created in any manner or for any purpose with no money or means in the treasury, nor current revenues collected, or in process of collection, for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limitation of indebtedness.

Action by the plaintiff, as an owner and resident of the city of Kaukauna, to have an ordinance adjudged null and void, and the defendants and all persons acting under their authority restrained from further proceedings thereunder. The ordinance in question was one by which the municipality purported to grant to the firm of Wells, Reichert & Co. the right to construct waterworks therein, to supply the city and its inhabitants with water for private and corporate purposes, and to authorize the making of a lease from that firm to the municipality. The ordinance provided that, upon the completion of the works and the making of a test by the city thereof, such works should be accepted by the city, which should pay thereafter a hydrant rental for ninety hydrants of the sum of six thousand dollars per annum, and for each additional hydrant that might thereafter be constructed the sum of fifty dollars, and that the city would, at no time, use less than ninety hydrants, and that the city would, for twenty years from the completion of the waterworks, pay a rental therefor, seven thousand dollars per annum for the first four years, nine thousand dollars per annum for the next six years, and ten thousand dollars per annum for the remaining ten years. The firm constructing these works was authorized, before the execution of the lease to the city, to pledge the works for the purpose of raising a sum not to exceed eighty thousand dollars, and to deliver to a trustee its mortgage upon the works, and issue bonds in denominations of five hundred dollars each, not exceeding in the aggregate one hundred thousand dollars, and bearing interest at six per cent per annum, payable semi-annually. The bonds were to be paid

at such times and in such manner that the city, in case it should lease the works, might have applied to the principal all sums of money paid by it under the lease after satisfying the interest due upon the bonds. The lease provided that, upon payment of the sums of money at the times designated therein, the property should at once pass to, and vest in the city without any further conveyance or contract whatever. The city guaranteed on its part that it would only, during the existence of the lease, levy and collect a tax sufficient to pay the hydrant and lease rental accruing during each year, which tax, when collected, should be kept separate and known as the "Water Rental Fund," which fund should be irrevocably pledged and appropriated for the payment of the rental in the manner specified in the lease. The trial court, as conclusion of law, found that the ordinance was in conformity to the charter, was a valid grant of authority to construct the waterworks, and did not create an additional or unauthorized indebtedness against the city, and therefore that the defendants were entitled to judgment.

G. H. Dawson, for the appellant.

John M. W. Pratt, Thomas H. Kearney, E. A. Baker, Charles B. Wood, and Horace S. Oakley, for the respondents.

293 CASSODAY, C. J. It appears from the statement made that the ordinance was adopted May 4, 1894; that thereupon Wells, Reichert & Co. filed their acceptance of the same, and gave their bond for the faithful performance of the work, as required, which bond was approved by the city May 7, 1894; that such ordinance, acceptance, bond, and approval were therein agreed to be in full force and effect as a contract between the firm and the city; that by the terms of such contract such works were to be completed within seven months—that is to say, on or before December 7, 1894; that the city therein reserved the right at all times to have its engineer fully inspect the nature of the work done and materials furnished, and all books and papers, to enable him to ascertain the exact cost of the works; that to construct the works the firm was authorized to issue bonds of \$500 each to an amount not exceeding \$100,000, and to mortgage the plant to secure not exceeding \$80,000 of such bonds, which last amount was to be regarded the original cost of such plant; that as soon as completed and certified to by such engineer as such inspector, the city was **294** to receive the lease of the same, as prescribed: that such lease was to extend for twenty years from the completion of the works, which covers substantially all the time the fran-

chises are to remain in force, as they are to terminate January 1, 1915; that the firm was authorized to assign such lease to a trustee or mortgagee to effect a sale of such bonds; that after receiving the lease, the city was to pay, as rental thereon, annually, \$7,000 during each of the first four years, \$9,000 during each of the next six years, and \$10,000 during each of the remaining ten years; that such bonds were to be made payable at such times and in such manner that all sums paid by the city as such lessee as rentals in excess of the interest upon the original cost may, at the time of payment, be at once applied to the payment and cancellation of the bonds to the amount so paid; that all surplus on the sale of the bonds, after paying the \$80,000 and accrued interest, was to apply on the payment of the principal sums named in the bonds, to the end that the city should only pay, as rentals, the original cost of the plant, \$80,000 and interest; that from the time of receiving the lease the city was not only to pay all taxes and assessments upon the plant, but to keep the same in repair, and pay all damages resulting from its maintenance and operation; that from a time not expressly named, but fairly implied to be the time of receiving such lease, the city was to "assume the management and operation of said system of waterworks"; that the city was, annually, for the term of said twenty years, to levy and collect a tax sufficient to pay such hydrant and lease rentals; that upon the payment of the several sums of money at the times and in the manner mentioned, without delay—that is to say, upon paying and taking up such bonds—then the plant should at once pass to and become the property of the city, without any further conveyance or contract whatever.

The upshot of the arrangement is to the effect that Wells, Reichert & Co. should construct the works, and issue bonds and secure the same by mortgage on the plant to the amount of \$80,000, and, when completed, lease the same to the city, and then assign the lease to the mortgagee or a trustee for the benefit of the bondholders, and that the city should thereupon take possession and assume the management and operation of the plant, and assume the payment of the outstanding bonds and mortgage in the manner indicated. The agreement to pay the annual rentals mentioned is but an indirect method of expressly agreeing to pay the principal and interest to become due on the several bonds. In fact, by the express provisions of the ordinance and the contents of each bond, as therein prescribed, the city is, in legal effect, to be a party to each and every bond, and necessarily responsible for its payment. The city was authorized "to

provide for the erection, maintenance, and operation of waterworks," and, "by contract or ordinance, grant to any person or persons, company, or corporation, the full right and privilege to build and own such waterworks, and to maintain, operate, and regulate the same": Laws 1891, c. 135, sec. 39, subd. 33. It was also authorized to "purchase or lease" waterworks, or the interest of any corporation therein, or to "obtain the control of such works by purchasing the stock of such corporation and keeping up its organization," and "provide for the payment of such purchase by the issuance of bonds or otherwise, . . . not contravening the provisions of the constitution in respect to municipal indebtedness": Laws 1895, c. 182. The constitution of this state provides that: "No county, city, town, village, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness"; ²⁹⁶ that before "incurring such indebtedness" such municipality must "provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same": Const., art. 11, sec. 3, as amended in 1874. It requires the authority of no adjudication to prove that this constitutional limitation means just what it says, and is absolutely binding, not only upon every such municipality and its officers, but also upon the legislature itself. Nevertheless we cite a few of the many cases construing similar constitutional provisions: *Buchanan v. Litchfield*, 102 U. S. 278; *Weightman v. Clark*, 103 U. S. 256; *School Dist. v. Stone*, 106 U. S. 183; *Litchfield v. Ballou*, 114 U. S. 190; *Lake Co. v. Rollins*, 130 U. S. 662; *Lake Co. v. Graham*, 130 U. S. 674; *Doon v. Cummins*, 142 U. S. 366; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610; *Hedges v. Dixon Co.*, 150 U. S. 182.

In *Litchfield v. Ballou*, 114 U. S. 190, it was held that: "A provision in a state constitution, that municipal corporations shall not become indebted in any manner nor for any purpose to an amount exceeding five per cent of the taxable property therein, forbids implied as well as expressed indebtedness, and is as binding on a court of equity as on a court of law." In *Lake Co. v. Rollins*, 130 U. S. 662, the words in the constitution of Colorado, "the aggregate amount of indebtedness of any county for all purposes," were construed to be "an absolute limitation upon

the power of the county to contract any and all indebtedness, not only for the purposes named in the act, but for every other purpose whatever, including county warrants issued for ordinary county expenses, such as witnesses' and jurors' fees, election costs, charges for board of prisoners, county treasurer's commissions," etc. In *Lake Co. v. Graham*, 130 U. S. 674, it was held that: "When the constitution of a state imposes upon the municipal corporations within it a limitation of their power to ²⁹⁷ incur debts, it is not within the power of the legislature of the state to dispense with that limitation, either directly or indirectly." Here the constitutional provision prohibits the city from becoming "indebted in any manner or for any purpose to any amount" exceeding five per centum of the assessed valuation. The same language is contained in the constitution of Iowa; and in *Doon v. Cummins*, 142 U. S. 376, it was held, in effect, that negotiable bonds, in excess of such limit, issued by a school district, and sold for the purpose of applying the proceeds of the sale to the payment of an outstanding bonded indebtedness of the district, pursuant to the statute of Iowa, were void as against one who purchased with knowledge that such limit had been exceeded. In that case Mr. Justice Gray, speaking for the court, cites five Iowa cases to the effect that the law, as settled by the supreme court of that state, is that such "constitutional restriction includes not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of the current revenues." The Iowa cases thus cited support the proposition: See, also, *Kane v. Independent School Dist.*, 82 Iowa, 5; *First Nat. Bank v. District of Doon*, 86 Iowa, 330; 41 Am. St. Rep. 489. In *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785, it was held that when such constitutional limit had been reached, the municipality is prohibited from making any contract whereby an indebtedness is created, even for the necessary current expenses in the administration of the affairs and government of the corporation. In *Culbertson v. Fulton*, 127 Ill. 30, it was held that: "Where a city enters into a contract to pay a sum of money when certain work [waterworks] shall be done and accepted, the obligation thereby assumed will constitute a debt within the meaning of the constitutional limitation of its power to incur indebtedness. Such indebtedness will be regarded as having been incurred from the date of the contract, and not postponed ²⁹⁸ to the time of the completion and acceptance of the work." "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to

carry on their corporate operations, while so indebted, upon the cash system, and not upon credit to any extent or any purpose": *Prince v. Quincy*, 128 Ill. 443. In *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, it was held that: "A contract by a city to pay an annual rental for the use of water hydrants and electric lights is a contracting of indebtedness, within the meaning of a constitutional limitation, when the city is already indebted beyond the prescribed limit, although the usual and legal income from taxation and otherwise would be sufficient to pay all the current expenses, including such rental." In harmony with the decisions cited, this court has held that: "Where a county is already indebted in a sum exceeding five per cent of the value of the taxable property therein, it cannot incur a further indebtedness for building a courthouse, or for any other purpose; and a tax levied to pay such further alleged indebtedness is void": *Hebard v. Ashland Co.*, 55 Wis. 145. As already indicated, the case at bar is clearly distinguishable from that class of cases where there is a mere annual rental for a series of years, and where there is no liability except as each year's service is rendered by some person, company, or corporation, as in *Crowder v. Sullivan*, 128 Ind. 486; *Smith v. Dedham*, 144 Mass. 177. So long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit, even though there may be for a short time some unpaid liabilities. In other words, a municipality's capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount ²⁹⁹ of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due. But the moment an indebtedness is voluntarily created "in any manner or for any purpose," with no money nor assets in the treasury, nor current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness. It appears from the statement that the valuation of the property in the city, as shown by the assessment-rolls for 1894, was only \$1,114,500; that the bonded indebtedness of the city was \$73,000; that the total receipts were only \$61,377.78; that the annual disbursements were \$43,963.10; that the average rate of taxation was 4.47 per centum; that the amount of tax levied was \$51,287.53, and the amount collected \$48,294.64. Such being the facts and the

law, it is evident that by the contract in question the city attempted to become indebted to an "amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein," within the meaning of the constitutional provision quoted, and hence the same is void. The method by which the attempt was made may be regarded as ingenious, but it should be remembered, as indicated in one of the cases cited, that the city could not do by indirection what it could not do directly.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiff in accordance with the prayer of his complaint.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—WHAT IS, WITHIN PROHIBITION AGAINST.—So far as any general definition may be given, it may be said that every indebtedness arising upon contract, whether express or implied, and by virtue of which a city is under obligation to a person, whether natural or artificial, is within these prohibitions, unless funds are on hand, or at least provided, for the payment of such indebtedness out of the current revenues of the municipality: Monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243, on the general subject. See, also, *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27; 56 Am. St. Rep. 828, and note.

REUTER v. LAWE.

[94 WISCONSIN, 300.]

PUBLIC STREETS AND SQUARES, ESTOPPEL TO DENY EXISTENCE OF.—Cases may arise where private rights have grown up so as to be, in equity, paramount to the public rights, and where the prevention of injuries requires the assertion of the doctrine of equitable estoppel in pais for the protection of such private rights. If lands designated on a map or plat made by the owner as a public square are afterward by him inclosed and claimed as his private property, and are taxed to him for many years, during which he exercises the rights and performs the duties of a private owner of them without interruption and without any claim being made by the public, and they are further recognized as his property on a plat adopted by a statute incorporating the city, after which he sells and conveys them, the municipality and the public are estopped from claiming that they still constitute a public square.

Action for a breach of the covenants of title included in a deed whereby George W. Lawe conveyed certain real property in the city of Kaukauna to the defendant. The plaintiff claimed that such real property at the time of the conveyance constituted a public square. In 1851, Lawe then being the owner of certain lands, including those in question, made a plat thereof, subdividing them into lots and blocks, and caused it to be recorded by the

register of deeds of the county for the purpose of establishing a legal town plat of the premises pursuant to the statutes of the state. On this plat certain premises were designated as a public square. Soon afterward, Lawe commenced selling lots, describing them in the conveyances according to such plat, and this plat was by him and all other persons thereafter recognized as a valid town plat. In 1878, Lawe united with Meade and Black in making and placing on record another town plat in which the property in controversy and other property was designated as "Lawe, Black & Meade's Addition to Kaukauna." On this plat a parcel of land designated on the former plat as a public park was, with a strip on the northwest side thereof sixty feet in width, designated as "Lawe's Park," and was subdivided into eight lots and designated as "block 21." Notwithstanding these plats, Lawe continued at all times until July, 1870, in possession of the property, having it inclosed and using it for the whole period, there being at no time any assertion by the public of title thereto, except that the premises were not assessed for taxes between 1851 and 1878. After the making of the second plat, however, they were assessed to Lawe, and he paid the taxes thereon until he sold and conveyed the property. In 1885, the city of Kaukauna was incorporated, and the plats already mentioned were expressly adopted, and provision was made for a renumbering of the lots by the city and a replatting and remapping of the premises included within the plats. By the power thus conferred proceedings were taken by the common council, the result of which was, that on May 1, 1890, an official map of the premises was recorded on which the property theretofore known as "Lawe's Park" was subdivided into lots, numbering 1 to 18 inclusive, of block 21. In 1885, Lawe constructed a sidewalk along one side of the park, and in 1890 incurred expenses in taking out stumps and otherwise improving the premises. On the seventeenth day of July, 1890, the premises were stricken from the assessment-roll for the year 1890, for the reason that it was claimed that they had been purchased for school purposes, and, in October following, the city claimed the premises as a public park by virtue of the alleged dedication thereof in 1851, and took, and has since continued in, possession. The trial court found that at the making of his deed Lawe was the owner of the premises in dispute, and that there had not been any breach of the covenants of his deed. Plaintiff appealed.

Humphrey Pierce, for the appellant.

David S. Ordway, for the respondent.

³⁰³ MARSHALL, J. Assuming, as appellant contends, that the recording of the plat of 1851, and the subsequent ratification ³⁰⁴ of it by Lawe and the public, under section 5, chapter 41, of the Revised Statutes of 1849, operated to make a valid town plat, and to vest the title to the premises in dispute in the public, notwithstanding noncompliance with statutory requirements, and without regard to any act of acceptance on the part of the public, yet we hold that the doctrine of equitable estoppel in pais applies to the case, and effectually bars the public from setting up any claim thereto. That rules this case, and the other questions raised need not be considered.

It is well settled that, though land be dedicated to the public use by a private owner, so as to vest the title in the donee for such use, until, in the judgment of the trustee, the premises are needed for such use, mere nonuser for any period of time will not operate as an abandonment of the property, so as to re-vest the title thereto in the donor: *Reilly v. Racine*, 51 Wis. 526; *State v. Leaver*, 62 Wis. 393; *Chase v. Oshkosh*, 81 Wis. 313; 29 Am. St. Rep. 398. The title being once vested in the public, the corporation in which it is situated, and upon which devolves the duty to administer the trust, has a broad discretionary power respecting the time when the public interests require the actual enjoyment of the property, as intended by the donor. It can allow such donor, in the mean time, for some purposes at least, to use the property as his own. Neither nonuser by the public, nor such actual use by the donor, standing alone, however long continued, will affect the status of the public right. Nowhere is this principle more thoroughly intrenched than in the jurisprudence of this state. We may go further and say that, if the title be once vested in the public under a dedication by a private owner, with or without acceptance by the donee, as circumstances may require, and the property is thereafter erroneously assessed and taxes collected thereon of the donor, that will not, of itself, necessarily affect the rights of the public. That is sustained by numerous well-considered cases cited by appellant's counsel: *Rhodes v. Brightwood*, 145 Ind. 21; *San Leandro v. Le Breton*, 72 Cal. 170; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Getchell v. Benedict*, 57 Iowa, 121.

But, notwithstanding what has preceded, it is not an open question in this court that the conduct of a municipal corporation may be such that a change of its position will cause such injustice to those who have relied upon such conduct as to warrant the court in preventing such change by an application of the doctrine of equitable estoppel in pais. This subject was so ex-

haustively discussed in *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, opinion by Mr. Justice Pinney, that it is needless to go over the matter again at this time. It was there, in effect, held that though a public corporation cannot alienate public streets and places, and mere laches on its part cannot defeat the public rights thereto, cases may arise where private rights have grown up so as to be in equity paramount to the public rights, and where the prevention of injustice requires the assertion of the doctrine of equitable estoppel in pais for the protection of such private rights.

The groundwork of the doctrine is, that it would be a fraud in a party to assert what his previous course had denied, when, on the faith of such denial, others have acted. To prevent the injustice a change of position by such party would cause to such others, under such circumstances, where there is no adequate legal remedy, the doctrine of equitable estoppel comes in and does the work. That the equitable rule is applied as freely against the public as against private persons is not maintained, but that the courts may administer justice by its aid, even where that results in controlling the conduct of municipal corporations, when the facts are such. in the judgment of the court, as to demand it to prevent manifest injustice and wrong to private persons, is firmly established. A large number of cases are cited in *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, where this principle ³⁰⁰ is maintained, to which may be added *State v. Janesville Water Co.*, 92 Wis. 496, recently decided by this court; also, *Los Angeles v. Cohn*, 101 Cal. 373; *Simplot v. Chicago etc. Ry. Co.*, 16 Fed. Rep. 360; *Crocker v. Collins*, 37 S. C. 327; 34 Am. St. Rep. 752.

The plat of 1878, by which what was formerly known as "Public Park," with a small addition, was platted as Lawe's Park; the tearing down of a rail fence about that time, and the construction of a new fence in its place, must be considered, we think, a distinct assertion of a private ownership of the property inconsistent with any public right thereto, and the commencement of possession adverse to the public. The taxing of the property thereafter as private property is a strong circumstance favoring such private ownership and abandonment, to be considered with all the other circumstances in determining whether Lawe was justified in treating it as so abandoned, and in incurring expense in taking care of and improving the same as discharged of any public right thereto. In *Simplot v. Dubuque*, 49 Iowa, 630, the court held that, where lands are granted to a city for public use, and are thereafter occupied by the donor adversely for a long

period of time and taxed to him, under the doctrine of equitable estoppel such city cannot subsequently deny the right of such occupant thereto.

In *Getchell v. Benedict*, 57 Iowa, 121, a distinction is made between cases where the lands taxed are adversely occupied and where not. We do not go so far as to approve the doctrine of *Simplot v. Dubuque*, 49 Iowa, 630, that the mere circumstances of adverse possession for a considerable length of time and taxation to the adverse occupant and payment of such taxes by him are sufficient to create an estoppel against the municipality. They are evidently important circumstances to be considered with the other facts in the case. The adoption of the second plat by the act incorporating the city of Kaukauna in 1885, the requirement made by such city of Lawe ³⁰⁷ to build a sidewalk along the side of the park, the construction of such sidewalk, the payment of taxes assessed annually on the property for a long period of years, and the improvement of the property at considerable expense, relying upon the long-continued recognition of private ownership by the municipality, in which all persons interested, so far as appears, acquiesced, with all the other facts and circumstances, show satisfactorily that, if a change of position on the part of the public be now allowed, such injustice and wrong will result as to warrant the application of the doctrine of equitable estoppel in pais to prevent such injustice. That, we assume, is the view the trial court took of the case, which answered the alleged breach of the covenants of title in the deed from Lawe to appellant, and sustains the findings and judgment appealed from.

By the Court. Judgment affirmed.

HIGHWAYS—DEDICATION BY MARKING OUT A VILLAGE PLAT—WHEN IRREVOCABLE.—The marking out of a village plat does not necessarily make the space a public way unless the authorities accept it as such. The mere making of sales of lots with reference to a map designating certain streets does not, therefore, constitute an irrevocable dedication to the public: Monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 753. The evidence of acts and declarations tending to show a dedication must be of such a deliberate and decisive character as to leave no doubt of the owner's intention: Monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 756. But after dedication is accepted, either formally or by user, even the levy of taxes against the owner and their collection is not conclusive against the claim of a highway by user: Monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 765.

ROBINSON v. SUPERIOR RAPID TRANSIT RAILWAY CO.

[94 WISCONSIN, 345.]

RES GESTAE in a suit for ejecting plaintiff from a railway car under the claim that he had not paid his fare include all the conversation between himself and the conductor about the fare at the time of, and immediately after, the ejecting, and also what the conductor said immediately after allowing the plaintiff to return and resume his seat in the car.

DAMAGES, EXEMPLARY, DISCRETION OF JURY.—Though, in an action for tort, the jury may, in their discretion, award exemplary damages, it is not proper to instruct them that the plaintiff is entitled to such damages. The court cannot determine this question, and can only instruct the jury to give such damages as they think proper.

DAMAGES, EXEMPLARY, FOR WRONG OF AGENT.—A principal is answerable in exemplary damages for the wrongful and malicious act of his agent where he neither authorizes nor ratifies it.

PRINCIPAL AND AGENT, RATIFICATION OF MALICIOUS ACT.—If a railway corporation retains a conductor in its employ after knowledge of a willful and malicious tort on his part, this is evidence of its ratification of such tort, but whether it was ratified or not is a question for the jury.

Ross, Dwyer & Hanitch, for the appellant.

Yate H. V. Gard, for the respondent.

346 CASSODAY, C. J. This is an action to recover damages by reason of the defendant having, without cause, unlawfully, willfully, maliciously, and with force and violence, ejected and expelled the plaintiff from one of its railway passenger cars, upon which he was rightfully riding after having paid his fare. The defendant answered, by way of admissions, denials, and allegations, to the effect that, if the plaintiff had paid his fare, the conductor of the car had forgotten the fact, and so ejected the plaintiff only after he had refused to inform the conductor whether he had paid his fare or not. At the close of the trial the jury returned a verdict to the effect that they found for the plaintiff, and assessed his damages at two hundred and fifty dollars, of which sum two hundred dollars was so ³⁴⁷ awarded as exemplary damages. From the judgment in favor of the plaintiff for the full amount stated and costs, the defendant brings this appeal.

1. We perceive no error in allowing the plaintiff to testify as to the conversation between himself and the conductor in respect to paying his fare while riding on the car, and at the time and immediately after he was ejected, and just after he got on the car again. The controversy was as to whether the plaintiff had or had not paid his fare. He was put off because the conductor claimed he had not paid his fare. He was allowed to get on the car again because the conductor became convinced that he had

paid his fare. The *res gestae* commenced when he paid his fare, and did not terminate until he returned to the car, and was allowed, by the conductor, to ride peaceably. Within the authorities, it included what the conductor said just after the plaintiff stepped back into the car: *Hooker v. Chicago etc. Ry. Co.*, 76 Wis. 542; *Hermes v. Chicago etc. Ry. Co.*, 80 Wis. 592; 27 Am. St. Rep. 69; *Reed v. Madison*, 85 Wis. 674. The case is clearly distinguishable from *Grisim v. Milwaukee City Ry. Co.*, 84 Wis. 22; *Ehrlinger v. Douglas*, 81 Wis. 59; 29 Am. St. Rep. 863.

2. Error is assigned because the trial court, after charging the jury to the effect that the plaintiff was entitled to a verdict for compensatory damages for all injuries, including injuries to his feelings, further charged them to the effect that if the conductor maliciously put the plaintiff off the car, then he was "also entitled" to what are called exemplary or punitive damages; that is, something different from, and over and above, the compensatory damages which the law allowed them to impose in such a case, in the way of warning and punishment, and as a public example. There is no claim that at the time in question the conductor was not acting within the scope of his employment, nor that the plaintiff had not paid his fare. The plaintiff was therefore entitled to compensatory damages. Whatever may be the ³⁴⁸ rule in other states, it is settled in this state that, in actions for personal torts, such compensatory damages include not merely the plaintiff's pecuniary loss, but also compensation for mental suffering; and that, in awarding such damages in such a case, no distinction is to be made between other forms of mental suffering and that which consists in a sense of wrong or insult: *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Fenelon v. Butts*, 53 Wis. 344; *Grace v. Dempsey*, 75 Wis. 323; *Reinke v. Bentley*, 90 Wis. 459. The question here presented is, whether the plaintiff was "also entitled," as a matter of law, to "exemplary or punitive" damages, in case the jury found that the conductor maliciously ejected the plaintiff. In *Day v. Woodworth*, 13 How. 371, Mr. Justice Grier, speaking for the court, said that, "in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. . . . 'This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.'" This is quoted approvingly by Mr. Sutherland (1 Sutherland on Damages, sec. 392). The same was followed in *Pike v. Dilling*,

48 Me. 539, where numerous adjudications are referred to, and an instruction to the jury to the effect that in such case they "were authorized, if they thought proper, in addition to the actual damages the plaintiff has sustained, to give him a further sum, as exemplary or vindictive damages, both as a protection to the plaintiff and as a salutary example to others, to deter them from offending in like cases," was held to be in accordance with the weight of judicial authority in this country. In *Webb v. Gilman*, 80 Me. 188, it was said by the court that "exemplary or punitive damages cannot be demanded as a matter of right; actual damages may be." To the same effect: *Footte v. Nichols*, 28 Ill. 486; *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689; *Wabash etc. Ry. Co. v. Rector*, 104 Ill. 296; *Boardman v. Goldsmith*, 48 Vt. 403; *Snow v. Carpenter*, 49 Vt. 426; *Kentucky etc. R. R. Co. v. Gastineau*, 83 Ky. 119; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135; *Stilson v. Gibbs*, 53 Mich. 280; *Wilson v. Bowen*, 64 Mich. 133. In the last Illinois case cited, an instruction substantially like the one in the case at bar was held bad. In one of the Kentucky cases cited, an instruction that the jury "should" give punitive damages if they found the neglect willful was held error; and, in the other Kentucky case cited, it was held error to instruct in such a case that the jury "ought" to award punitive damages. It is true that an instruction to the effect that the jury "ought" to give exemplary damages in such a case was sustained by this court in *Hooker v. Newton*, 24 Wis. 292; but the case is not in harmony with the best-considered cases nor with the weight of authority. Mr. Thompson, in his excellent work, after stating that "the jury may, if they think proper, give damages by way of punishment," says: "It may be stated that, in cases in which such damages may be given, whether they will be given or not is a question within the discretion of the jury. Many judgments have been reversed because the jury were allowed to give such damages, but no case is recollected where a judgment was reversed because such damages were not given, though, possibly, such cases may be met with in the recent books of reports": 2 Thompson on Trials, sec. 2065. The reason for the rule, as indicated in some of the cases cited, is that the primary object of such action is to fairly compensate the plaintiff for the wrong he has suffered and the injury he has sustained, and that he is not entitled, as a matter of legal right, to anything more. Accordingly, some courts of high standing refuse to allow punitive damages in cases similar to this.

3. There is another matter calling for consideration. The charge left the question of exemplary damages to turn ³⁵⁰ wholly upon the question whether the conduct of the conductor was malicious, the same as though the action had been directly against him. This court has repeatedly held, in effect, that such exemplary damages can only be recovered against the principal for the wrongful and malicious act of the agent, when such act is either authorized or ratified by the principal: *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Bass v. Chicago etc. Ry. Co.*, 36 Wis. 450; 17 Am. Rep. 495; 39 Wis. 636; 42 Wis. 654; 24 Am. Rep. 437; *Eviston v. Cramer*, 57 Wis. 570; *Patry v. Chicago etc. Ry. Co.*, 77 Wis. 218; *Mace v. Reed*, 89 Wis. 440; *Hagan v. Providence etc. R. R. Co.*, 3 R. I. 88; 62 Am. Dec. 377. On the same day that the plaintiff was so ejected from the car, September 12, 1894, the conductor reported his version of the transaction to the defendant; but that report, while it was not expressly excluded on the objection of the plaintiff, was allowed in evidence simply as showing that the defendant had no knowledge of wrong on the part of the conductor. The only evidence of notice to the defendant that the conduct of the conductor was malicious is the allegations contained in the complaint served September 25, 1894. There is nothing to indicate that the complaint was read to the jury, nor that they knew its contents, and the trial court stated, at the time the evidence was excluded, that there was not any evidence in the case of ratification. It does appear that the conductor was in the employ of the defendant from July 28, 1894, to December 18, 1894, and then left of his own accord. Such retention of the conductor in the employment of the defendant, with knowledge that such conduct of the conductor was wilful and malicious, would have been evidence tending to prove ratification. The decisions of this court cited are to that effect: See, also, cases cited in the notes to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 387; *Cleghorn v. New York etc. R. R. Co.*, 56 N. Y. 47; 15 Am. Rep. 375. In taking the question of such ratification from the jury, the court necessarily held that, if the jury found that ³⁵¹ the conduct of the conductor was malicious, then the defendant was conclusively bound to know the same, because it was so alleged in the complaint. This, we think, was error.

By the Court. The judgment of the superior court of Douglas county is reversed, and the cause is remanded for a new trial, or, at the option of the plaintiff, for judgment in his favor on that part of the verdict assessing compensatory damages.

EVIDENCE—RES GESTAE—EJECTION OF PASSENGER FROM RAILWAY CAR.—Res gestae are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character: *Pinney v. Jones*, 64 Conn. 545; 42 Am. St. Rep. 209, and note; note to *Wilson v. Southern Pac. Co.*, 57 Am. St. Rep. 771. Declarations by a train conductor as to his motives of hostility in ejecting a passenger, made to another passenger eight or ten minutes after the ejection, are not admissible against the railway company either as an admission or as part of the res gestae: *Barker v. St. Louis etc. R. R. Co.*, 126 Mo. 143; 47 Am. St. Rep. 646. See *Sullivan v. Oregon Ry. etc. Co.*, 12 Or. 392; 53 Am. Rep. 364.

DAMAGES—EXEMPLARY—DISCRETION OF JURY.—The court must determine whether there is any evidence before it upon which an award of exemplary damages can be sustained, and must not submit the question of such damages to the jury in absence of such evidence. When the evidence is such that the jurors may, if they see fit, award such damages, the question whether it shall be awarded rests wholly with them, and the court should not undertake to influence their verdict by instructions: Monographic note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 883, on exemplary and punitive damages.

RAILROAD COMPANIES—TORTS OF SERVANTS—RATIFICATION—RETENTION IN SERVICE.—A company cannot be held to have ratified an assault and battery committed by its servant by retaining him in its service, where it believed his account of the affair and thought it just to maintain the statu quo until a judicial determination of the matter had been had: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512. The question as to whether such retention in service amounts to a ratification of the servant's tort and fixes the evil motive on the carrier should be left to the jury under the evidence: *Dillingham v. Russell*, 78 Tex. 47; 15 Am. St. Rep. 753. See *Gulf etc. Ry. Co. v. Reed*, 80 Tex. 362; 28 Am. St. Rep. 749, and note.

KLIEGEL v. AITKEN.

[94 WISCONSIN, 482.]

ONE WHO NEGLIGENTLY EXPOSES ANOTHER TO AN INFECTIOUS OR CONTAGIOUS DISEASE, which such other thereby contracts, is liable in damages therefor, in the absence of contributory negligence or the assumption of risk.

MASTER AND SERVANT, EXPOSING SERVANT TO CONTAGIOUS DISEASE.—If a master exposes a servant, without warning, to a contagious or infectious disease, the latter not knowing of the danger, nor being able to know of it by the exercise of ordinary care, the master is answerable for the resulting injury to his servant, if the master knew, or by the exercise of ordinary care ought to have known, of the peril.

EXPERT EVIDENCE.—IF HYPOTHETICAL QUESTIONS ARE ASKED EXPERTS, purporting to state facts testified to by other witnesses, and no material misstatements or omissions are pointed out in such questions, there is no error in permitting the witnesses to answer them, though some immaterial fact may have been omitted from the interrogatories.

RES GESTAE.—WHERE A PERSON IS AUTHORIZED TO HIRE ANOTHER to do service in his family, a member of which is ill, the entire conversation with him at the time of the hiring is admissible as part of the *res gestae*, but, if he was not authorized to make any representations about the nature of the disease, what he said upon that subject is not admissible as a representation binding upon the person who sent him.

DAMAGES FOR ILLNESS, INSTRUCTION CONCERNING. In an action to recover damages for being exposed to, and contracting, a contagious disease, an instruction that the plaintiff may recover for her loss of time while ill, her medical expenses, and for the pain she has suffered in the past or may have to endure in the future, but that, in order to assess damages for the future, the jury must be satisfied to a reasonable extent, from the evidence, that she will continue to suffer, is not erroneous. It does not justify the giving of damages for the future which are not reasonably certain to result.

Dalberg & Becher, for the appellant.

Ryan & Merton, for the respondent.

435 WINSLOW, J. The general principle is well established that one who negligently—that is, through want of ordinary care—exposes another to an infectious or contagious disease, which such other thereby contracts, is liable in damages therefor, in the absence of contributory negligence or assumption of the risk: *Gilbert v. Hoffman*, 66 Iowa, 205; 55 Am. Rep. 263; *Smith v. Baker*, 20 Fed. Rep. 709. It follows from this that if a servant is exposed by his master without warning to such a risk, and thereby contracts the disease, he being ignorant of the danger, and unable to know of it by the exercise of ordinary care, the master is liable if he either knew, or in the exercise of ordinary care ought to have known, of the danger. This is but an application to different circumstances of a rule frequently applied in cases of injuries received by a servant resulting from latent dangers in machinery; namely, that a servant is not to be exposed without warning to latent dangers of which he knows nothing, and is not chargeable with imputed knowledge, provided the master knew, or ought to have known, of the danger. In the case before us, the complaint charged a case within the foregoing principles, and the plaintiff's evidence tended to establish such a case. The judge's charge was also in substantial accord with the principles stated, and the only questions to be considered relate to rulings in the course of the trial. A number of exceptions were preserved upon the trial, and those which seem to us of sufficient importance will now be briefly considered.

436 1. Certain medical experts were called, and hypothetical questions were put to them, purporting to state the facts testified to by the plaintiff, and they were asked upon these facts and upon all the plaintiff's testimony when and where, in their opin-

ion, the plaintiff contracted the disease. All the experts, save two or three, testified that they had heard all of the plaintiff's testimony, and the two or three say that they heard all but a portion upon recross-examination, which appears to have developed nothing of moment in addition to her previous testimony. The facts stated in the question itself seem to be justified by the plaintiff's evidence. The defendant has called attention to no important or material omissions or misstatements, and we are unable to discover any error in the ruling of the court allowing the questions to be answered.

2. The complaint charged an actual misrepresentation as to the nature of the disease with which the defendant's daughter was afflicted, as well as negligent failure to warn the plaintiff of the danger. The answer of the defendant denied that he ever called on the plaintiff, or authorized any one to call on her, to take care of his daughter; and in fact it may be construed to deny that he ever employed the plaintiff at all, though admitting that she was at his house for a time, rendering assistance. Evidently, to meet this denial, the plaintiff proved that defendant sent one Patterson to her house to ask her to come and help in the family, and then proved that Patterson did come and see her, and told her, in course of the conversation, that the defendant's daughter had nervous prostration. This evidence as to what Patterson said as to the character of the disease was objected to, but allowed to go in by the court. We think it was admissible as part of the transaction. The contract of hiring was put in issue by the answer. It was certainly competent, perhaps essential, that the plaintiff should prove that the defendant applied to her, either personally or by an agent, to come to work for him; and the entire ⁴³⁷ conversation at the time seems clearly admissible as part of the *res gestae*, if on no other ground. So there appears to us to be no error in admitting the evidence. The effect, however, which that statement should have on the case is a different question. The trial judge, in his original charge to the jury, entirely ignored the question of the alleged false representation by Patterson, and submitted the case to the jury solely upon the question as to whether the defendant was liable for negligence in not warning the plaintiff of the nature of the disease and the danger of infection or contagion. The defendant proposed no instruction, but at the conclusion of the charge asked the trial judge if he would charge the jury on the question of misrepresentation and the agency of Mr. Patterson. In response to this the judge said to the jury, in substance, that if Patterson was defendant's agent, he

could bind defendant for anything within the scope of his agency, whatever they found that to be, but no farther; that Patterson claimed he had no authority from defendant to say she had anything else, and that he said what he did say of his own accord. We should have been better pleased had the trial judge charged directly that Patterson could not bind the defendant by a statement as to the character of the disease unless Aitken authorized him expressly or impliedly to make a statement on the subject. Probably the judge would have given such an instruction had he been requested to do so, but he was not asked. As to the instruction which was given, it seems to us not incorrect in itself, and, while, not as definite as might have been desired, we think it must have been understood by the jury as meaning that, unless Patterson had authority from defendant to make some statement on the subject, no representation which he made would be binding on the defendant.

3. As to the measure of damages, the court charged that she might recover for her loss of time while ill; her medical expenses. "Then she is entitled to damages for the pain ⁴²⁸ and suffering she has endured in the past and which she may have to endure in the future. But, in order to assess damages for the future, you must be satisfied to a reasonable extent from the evidence that she will continue to suffer." It is said that this charge violates the rule laid down in *Hardy v. Milwaukee Street Ry. Co.*, 89 Wis. 183, and other cases, to the effect that damages for future disability must be such as are reasonably certain to result, not such as may result. The criticism is not well founded. The judge told the jury that, in order to assess damages for the future, they must be satisfied to a reasonable extent from the evidence that she will continue to suffer. This, it seems to us, is a substantial equivalent to "reasonable certainty."

4. Upon motion for a new trial, the point was made that the plaintiff was not of age when taken sick, and did not attain her majority until about eight months thereafter; consequently, that she had recovered for time lost before her majority, which of course belonged to her father; also that the evidence showed that the medical bill of eighty dollars was paid by her father. Upon this the plaintiff remitted two hundred and fifty dollars from the verdict. The testimony showed the number of weeks which elapsed after her illness began and the time of her majority; also the maximum amount which she could earn per week; also the exact amount of the physician's bill, paid by her father. These, being certain and definite sums, could be ascertained by the court without assuming the functions of a jury,

and they could, therefore, be remitted: *Nudd v. Wells*, 11 Wis. 407. The amount remitted by the plaintiff more than covers these amounts, but of this the defendant cannot complain. We find no substantial errors in the record.

By the Court. Judgment affirmed.

NEGLIGENCE—EXPOSURE TO INFECTIOUS DISEASE.—An innkeeper, knowing that there was smallpox in his inn, kept it open for business, and received the plaintiff as a guest. The plaintiff did not know that there was smallpox in the inn, but had heard rumors to that effect. The plaintiff contracted the disease, and defendant was held liable: *Gilbert v. Hoffman*, 66 Iowa, 205; 55 Am. Rep. 263, and extended note. See, also, *Long v. Chicago etc. R. R. Co.*, 48 Kan. 28; 30 Ar. St. Rep. 271.

MASTER AND SERVANT—ASSUMPTION OF RISKS—LIABILITY OF MASTER.—A master is under obligation to furnish his servant a reasonably safe place in which to work, or to explain to him the dangers which he knows or ought to have known, and of which the servant is not chargeable with notice or knowledge: *Meter v. Morgan*, 82 Wis. 289; 33 Am. St. Rep. 39, and note. A servant assumes only such risks and dangers as are incident to his service: *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336; 48 Am. St. Rep. 633, and note.

WITNESSES—EXPERT—HYPOTHETICAL QUESTIONS.—When the testimony of an expert is proper, counsel may assume the existence of any state of facts which the evidence tends to justify, and base their questions upon such assumption: *Wintringham v. Hayes*, 144 N. Y. 1; 43 Am. St. Rep. 725, and note.

RES GESTAE—WHAT ARE PART OF.—The subject of *res gestae* is considered in *Robinson v. Superior etc. Ry. Co.*, 94 Wis. 345; ante, p. 896.

DAMAGES FOR FUTURE PAIN OR DISABILITY.—In an action to recover damages for personal injuries of a permanent nature, physical and mental pain which the person injured is reasonably certain to suffer in the future may be recovered for: *Note to Louisville etc. R. R. Co. v. Minogue*, 29 Am. St. Rep. 381; *Standard Oil Co. v. Tierney*, 112 Ky. 367; 36 Am. St. Rep. 595. See, also, *Heddles v. Chicago etc. Ry. Co.*, 77 Wis. 228; 20 Am. St. Rep. 106, and note.

KEYSTONE LUMBER COMPANY v. KOLMAN.

[94 WISCONSIN, 465.]

A LICENSE TO CUT TIMBER IS ASSIGNABLE whether made so by express words or not.

A LICENSE TO CUT AND REMOVE STANDING TIMBER does not vest title in the licensee prior to the severance of such timber.

REPLEVIN BY A LICENSEE TO CUT TIMBER.—Though one having a license to cut and remove standing timber has no title in the timber until it is severed, yet, upon such severance by a trespasser, the title of the licensee becomes perfect, and he may maintain replevin against the trespasser for the timber so severed by him.

DAMAGES, ACTS OF TRESPASSER IN MITIGATION OF. If a trespasser cuts standing timber which another had a license from the owner to cut and remove, and the latter sues the trespasser in replevin therefor, he thereby ratifies the act of such trespasser in severing the timber, and must allow him the reasonable cost and such enhancement in value as has resulted from his labor and expenditures.

Tomkins & Merrill, for the appellant.

A. E. Dixon and Olin & Butler, for the respondent.

467 **NEWMAN, J.** The instrument under which the plaintiff claims title to the lumber in controversy is a mere license to cut and remove the timber. This is clear from its express terms. A license to cut timber is assignable, whether made so by express words or not: 13 Am. & Eng. Ency. of Law, 1031. This license is made assignable by express words. So the plaintiff had the right to cut and remove this timber, and make it his own, at pleasure, at any time within the limited period, at least, unless the license should be sooner revoked. Whether the license gave such an interest in the timber to the licensee as that it should be deemed irrevocable by the licensor, it is not important to inquire. In either case the title to the timber did not pass to or vest in the licensee until it should be severed from the land. The mere license to cut and remove the timber did not vest the title to the timber in the licensee. So, until the fact of its severance, the licensee has no title in the timber, such as would support an action of replevin; for, to maintain an action of replevin, the plaintiff must have the general or a special property in the property replevied, and the right to immediate and exclusive possession, at the time when the action is commenced. In the action of replevin the principal question is the right of immediate possession. Where that right depends upon the title, the issue is one of title. Now, as a mere licensee to cut timber gets no title to the timber until it is actually severed, and this timber was cut by a wrongdoer, and not by the licensee, the case comes to depend on this **468** question: Whether the title to the timber, when cut by a trespasser, vests in the licensee, so as to give him sufficient title to maintain replevin against the mere trespasser. This question is not decided by any case in this court to which attention is called, or which has been found. A question which, on a superficial view, may seem to bear some analogy to this question, has been decided by this court. It has been decided that, where timber or minerals have been severed by the owner of the land, the title to the timber or minerals so severed does not vest in a mere licensee, so that

he can maintain replevin for them against the owner of the land. *Gillett v. Treganza*, 6 Wis. 343, is a leading case upon that question. The reason is plain. Severance by the owner operates as a revocation of the license, at least pro tanto; and the title, not having passed before severance, will not pass by severance after the license has been revoked. But that question has little, if any, analogy to the question in the instant case.

This question is whether a licensee under an unrevoked license to cut and remove timber, for which he has paid full value, has sufficient title in the timber covered by his license to support replevin for the timber when wrongfully cut by a trespasser. This question does not seem to have often been passed upon by the courts. The case of *Gamble v. Cook*, 106 Mich. 561, seems to be in point. In that case it was held by the supreme court of Michigan that a vendee in a land contract which gave him the right of possession and to cut and remove timber had title in the timber sufficient to maintain replevin for timber cut by a mere trespasser. No doubt, in that case the legal title to the timber was in the vendor until the severance by the trespasser. No reason is perceived why that case is not sound in principle. The trespasser gets no legal title or right in the timber through his wrongful act, as against any person who has a legal right or interest in it. The ⁴⁶⁹licensor has no just claim, for he has sold it, and has had his pay. He makes no claim. He is not injured. To preserve the fiction of legal title in him, beyond the severance, can have no other effect than to obstruct justice. In justice, the severed timber should belong to the licensee, who has bought and paid for it. He might have employed the trespasser to cut and remove it. In that case there would be no doubt that the title to the severed timber would be in him. No reason is perceived why, when the timber is cut by one unauthorized, the licensee may not at once assume possession of it; why he may not adopt the act of the wrongdoer, in the severance, as his own, and ratify, so to speak, the unauthorized act—somewhat in analogy to the principle by which the unauthorized acts of agents are ratified or a tort is waived. That view has the merit, at least, of doing complete justice among the parties.

But, if the plaintiff adopts or ratifies the acts of the defendant in the severance of the timber, it must adopt them in full. It must adopt as well that part which carries a burden as that which is to its benefit. In the view which has been taken, the wrongful acts of the defendant have proved, on the whole, to have been a real service to the plaintiff. If the plaintiff adopts

this benefit, it should reimburse the defendant what he has reasonably disbursed in its service. The plaintiff should recover the lumber or its value, after paying the defendant the reasonable cost of such enhancement of its value as has resulted from his expenditures upon it. Perhaps the defendant was entitled to retain possession of the lumber until such costs were paid; but it does not appear that his refusal to deliver it to the plaintiff was put upon any such ground.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CASSODAY, C. J. I agree with that portion of the opinion filed which is to the effect that the written "instrument ⁴⁷⁰ under which the plaintiff claims title to the lumber in controversy is a mere license"; that "the mere license to cut and remove the timber did not vest the title to the timber in the licensee"; that, until severance, the licensee had "no title in the timber" that "would support an action of replevin"; that, "to maintain an action of replevin, the plaintiff must have the general or a special property in the property replevied, and the right to immediate and exclusive possession, at the time when the action is commenced." But I am compelled to dissent from the conclusion reached to the effect that the plaintiff may, without any such title vested in itself, and with the title vested in the railroad company, maintain this action, merely because the timber was wrongfully severed by the defendant. That this license to cut and remove timber from the land of the railroad company was revocable, and vested no title or interest in the plaintiff, is settled by numerous adjudications of this court: *Hazelton v. Putnam*, 3 Pin. 107; 54 Am. Dec. 158; *Clute v. Carr*, 20 Wis. 531; 91 Am. Dec. 442; *Duinneen v. Rich*, 22 Wis. 550; *Fryer v. Warne*, 29 Wis. 511; *Strasson v. Montgomery*, 32 Wis. 52; *Golden v. Glock*, 57 Wis. 118; 46 Am. Rep. 32; *Thoemke v. Fiedler*, 91 Wis. 386. Some of these cases held that such a license is not assignable. I do not think the decision in this case is supported by *Gamble v. Cook*, 106 Mich. 561, cited in the opinion filed. In that case it was held that "the vendee under a land contract, with the right to cut and remove timber, has title sufficient to maintain replevin for timber cut on the land by a mere trespasser." In that case the vendee had paid all the purchase money, and had taken possession of the land, and so was not a mere licensee, as here, but the real owner. Such contract gave the vendee a vested interest in the land and the growing timber, which could have been specifically enforced:

Young v. Lego, 36 Wis. 394; Lacy v. Johnson, 58 Wis. 422; Lillie v. Dunbar, 62 Wis. 198. The decision in the case at bar allows the plaintiff to recover on the ground that it waived the defendant's tort, and adopted his wrongful ⁴⁷¹ act in severing and removing the timber. But there is nothing in the complaint nor in the record indicating such waiver. On the contrary, the complaint expressly alleges, in effect, that the plaintiff was the owner, and entitled to the possession, of the lumber, and that the defendant wrongfully took and unlawfully or wrongfully detained the same from the plaintiff. Besides, the tort (the wrongful act complained of) was not, and could not in law be, wrongful as against one not having any title or vested interest in the timber, but was necessarily wrongful as against the one having the legal title and exclusive right to the timber; and the plaintiff could not, as it seems to me, vicariously waive such tort for the legal owner. For aught that appears, the defendant is liable in law to the railroad company for all the timber he so cut and removed. But the decision in this case, as I understand it, only allows the plaintiff to recover on condition that it "reimburse the defendant what he has reasonably disbursed in its service"; that it "should recover the lumber or its value" only "after paying the defendant the reasonable cost of such enhancement of its value as has resulted from his expenditures upon it"; and indicates a possibility of the defendant's being "entitled to retain possession of the lumber until such costs were paid." To carry out these suggestions would seem to require an equitable accounting as to the reasonable value of the defendant's services and disbursements of cutting and removing the timber, and putting the same in the condition it was found at the time this action was commenced. Such an accounting would seem to be an anomaly in a straight action of replevin, like this, and does not seem to be contemplated in the verdict and judgment prescribed by the statutes: Rev. Stats., secs. 2859, 2888. For the reasons hastily and thus summarily given, I am forced to disagree with my brethren.

LICENSE—ASSIGNABILITY—TO CUT TIMBER.—A license is nonassignable: Hazelton v. Putnam, 3 Pinney, 107; 3 Chand. 117; 54 Am. Dec. 158; Dark v. Johnston, 55 Pa. St. 164; 93 Am. Dec. 732, and note; extended note to Lawrence v. Springer, 31 Am. St. Rep. 713. A license to cut timber on the grantor's land is not assignable: Emerson v. Fisk, 6 Greenl. 200; 19 Am. Dec. 206.

LICENSE TO CUT AND REMOVE TIMBER—WHEN VESTS TITLE IN LICENSEE.—A license to enter on land, cut and remove timber, is only revocable so far as relates to timber not cut at the time: Giles v. Simonds, 15 Gray, 441; 77 Am. Dec. 373, and note. If the license is not revoked before the trees are severed, the title to

the trees will vest in the licensee, who will have a right to enter and remove the trees thus severed: *Owens v. Lewis*, 46 Ind. 488; 15 Am. Rep. 295; extended note to *Lawrence v. Springer*, 31 Am. St. Rep. 714.

REPLEVIN—WHEN LIES.—Replevin is a possessory action, and does not necessarily determine title: *Pearl v. Garlock*, 61 Mich. 419; 1 Am. St. Rep. 603. It lies wherever trespass de bonis asportatis would lie: *Crocker v. Mann*, 3 Mo. 472; 26 Am. Dec. 684, and note; or in any case where the plaintiff has a present right to the possession of any personal property in the possession of the defendant: *Shaddon v. Knott*, 2 Swan. 358; 58 Am. Dec. 63; *Hellman v. Withers*, 3 Ind. App. 522; 50 Am. St. Rep. 295, and note.

McKEON v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

[94 WISCONSIN, 477.]

ACTION, WHEN FOR TORT RATHER THAN UPON CONTRACT.—A complaint against a railway company alleging that there was an implied contract that the defendant would awaken plaintiff in time to enable her to dress herself and child before reaching a designated station, and to prepare herself to leave the train safely and without haste, and that the defendant neglected to do so, but, waiting until the station was reached, then awoke her, and, refusing to delay the train, forced her from her berth before she could dress, and, refusing her time to put on her clothing, pushed her out of the car into another, exposing her unclad to the gaze of spectators there present, and bruising and injuring her, states a cause of action in tort.

RAILWAY SLEEPING-CARS, DUTY TO AWAKEN PASSENGERS.—If a female passenger has a sleeping-car ticket to a station designated, it is the duty of the railway to awaken her in time to make the necessary preparations to leave the car in a suitable and decent manner upon reaching the station, or, failing to do so, to hold the train a sufficient length of time to enable her to make such preparations as are necessary to leave the car without the exposure of her person to the gaze of spectators.

EXPERT EVIDENCE.—MEDICAL EXPERTS who heard the plaintiff give a part of her testimony and had the balance of it read to them by the court reporter may testify what, in their opinion, was the cause of a miscarriage suffered by her.

JURY TRIAL.—AN INSTRUCTION THAT THE WORDS "DIRECT AND PROXIMATE CAUSE" mean a cause which naturally led to, and might have been expected to be instrumental in producing, the result complained of, and that if they find the failure to awaken the plaintiff so as to give her reasonable time to dress herself before the train in which she had a berth had reached her station, and the treatment which she received therefrom was the cause which, under the proof, led naturally to, and which might have been expected to be directly instrumental in producing, the injury which they find the plaintiff had sustained, then that they might find the defendant answerable for such injury, is substantially correct. If the defendant wished the instruction more definite and certain in any respect, it should have requested the desired modification.

SLEEPING-CARS, CARE IN AWAKENING PASSENGERS. If the porter of a sleeping-car does not awaken a passenger at her

station for leaving the train, nor attempt to do so, nor have any good reason for thinking he has done so, he has not used sufficient care and diligence, and his employer is liable for the resulting injuries to a passenger thus neglected.

RAILWAYS, CARE REQUIRED OF.—In carrying passengers, railroads are held to the highest degree of care, diligence, and skill consistent with such mode or means of transportation under the circumstances.

JURY TRIAL.—A special verdict is not designed to elicit from the jury mere evidentiary facts or an abstract of the evidence, and a court does not err in refusing to submit questions to the jury for the purpose of securing its finding respecting facts of that character.

JURY TRIAL.—ALL QUESTIONS AS TO THE CREDIBILITY OF THE WITNESSES and the weight and effect of their testimony is for the jury, and a court properly refuses an instruction designed to cast doubt upon the testimony of any particular witness.

DAMAGES FOR HUMILIATION AND SHAME.—A request to instruct a jury not to allow anything for feelings of humiliation and shame unless they contributed to plaintiff's bodily injury is properly refused, in an action by a married woman for not awakening her in time to enable her to dress before reaching the station where she must change cars, and then hustling her out of the sleeping-car half clad and exposing her in this condition to the gaze of spectators, and otherwise injuring her, whereby she suffered a miscarriage.

JURY TRIAL—INSTRUCTION RESPECTING WEIGHT OF EVIDENCE.—An instruction to a jury "that many of the claims of the plaintiff as to just what had occurred have been denied by the defendant's witnesses, and you will be called upon to find the facts you believe to be established by the fair weight of all the evidence" is not erroneous or misleading.

JURY TRIAL.—A VERDICT CANNOT BE REGARDED AS SO EXCESSIVE AS TO CREATE A BELIEF that the jury were misled by passion, prejudice, or ignorance, where it awards two thousand five hundred dollars damages to the plaintiff, a married woman, for not being awakened in time to dress before leaving a sleeping-car, and then being hustled unclad into another car, and thereby exposed, in that condition, to the gaze of spectators, and otherwise injured, from which she suffered a miscarriage.

Curtis & Read, Burton Hanson; and C. H. Van Alstine, for the appellant.

Van Hecke & Smart and H. C. Hetsel, for the respondent.

470 **CASSODAY, C. J.** This is an action to recover damages sustained by reason of the defendant's maltreatment of the plaintiff while riding on the defendant's passenger train, at and near New Lisbon, in this state, in respect to her changing cars at that place. Issue being joined and a trial had, the jury returned a special verdict, the findings of which, together with the undisputed facts, are to the effect that, on the evening of June 16, 1894, the plaintiff and her husband and their little boy were in Chicago; that the husband bought of the defendant two tickets—one for himself and the other for the plaintiff—from Chicago to Merrill, in this state; that they started on the train

about half past ten o'clock that evening; that, upon boarding the train, the plaintiff's husband bought a sleeping-car ticket for the plaintiff and their little boy from Chicago to New Lisbon; that within a few minutes after, the plaintiff and the little boy retired in their berth, and remained there until the train reached New Lisbon; that when the train reached Milwaukee, another sleeper, destined for Merrill, was attached to the train; that the train reached New Lisbon between 5 and 6 o'clock the next morning; that the defendant's porter did not awaken the plaintiff in time for her to dress herself and child before the train arrived at New Lisbon; that the defendant's porter did not attempt to awaken plaintiff at or near the station called Lyndon; that the defendant's porter did not have good reason to believe that he had ^{also} awakened the plaintiff; that the defendant's porter did not exercise proper care in his treatment of the plaintiff after she was awakened and until she was put into the Merrill sleeper at New Lisbon; that such failure to awaken the plaintiff, and her treatment by the defendant's porter after the train arrived at New Lisbon, was the direct and proximate cause of the injuries she sustained; that the plaintiff was not guilty of any want of ordinary care which contributed to cause the injuries she sustained; that, under all the attending circumstances, a nervous shock sufficient to cause bodily injuries, or damages of some form or some kind, to the plaintiff might have been reasonably expected by a man of ordinary intelligence and prudence conducting the business carried on by the defendant to result from the failure to so awaken the plaintiff, and from the treatment she received before and while being transferred to the Merrill sleeper; that if the court orders judgment for the plaintiff on the verdict, then the jury assesses her damages at two thousand five hundred dollars; that the plaintiff and little boy first passed into the sleeper for Merrill, and then, after a little while, went to a hotel in New Lisbon, and the plaintiff there laid down; that between 9 and 10 o'clock that morning, they started on the train from New Lisbon to Merrill—not in the sleeper, but in an ordinary passenger car; that at Mosinee Dr. E. C. Fish was called into the car to attend the plaintiff, and he found that she was about to have a miscarriage, and did have such miscarriage on the train. From the judgment entered on the special verdict in favor of the plaintiff, the defendant brings this appeal. Counsel assigns twenty-nine different errors, and these several errors are discussed under twenty-two different heads. We must be excused from dividing the transaction up into so many different fragments, and then considering each

fragment by itself, disconnected from the other facts and circumstances in the case, with which it is properly, if not necessarily, connected.

⁴⁸¹ 1. Some of these errors are based on the theory that the complaint alleges a cause of action on contract, and not in tort. True, the complaint alleges, in effect, that there was implied in the contract of carriage that the defendant would awaken the plaintiff a sufficient length of time before reaching New Lisbon to enable her to dress herself and child, and otherwise prepare herself to be ready to leave the train safely and without haste or delay when the same should arrive at that place. It also alleges, in effect, that, according to the rules and regulations of the defendant, and by common usage and practice, it was its duty to so awaken the plaintiff, and that the servants and employes of the defendant in charge of the sleeper agreed to so awaken her when she procured her berth, but that they "did not call nor awaken her before reaching New Lisbon, but neglected and failed so to do, without any reason therefor"; that the plaintiff was still sleeping when the train reached New Lisbon; that, upon reaching New Lisbon, the porter of the car drew the curtains in front of her berth apart, and informed the plaintiff, occupying the same, that the train had arrived at New Lisbon; that she must hurry and leave the train at once; that upon her requesting him to hold the train for a few minutes, to enable her to dress herself, he refused so to do, and continued to urge her to leave the car at once; that from the time she was awakened until the departure of the train from the station, the time was insufficient to permit the plaintiff to properly prepare herself and leave the train; that she at once arose from her berth, and the porter refused to allow her to put on her clothing, but pushed, hustled, and hurried her to the rear of that car, to which the sleeper for Merrill was attached, and into which she was required by the porter to go; that the train on which she had so been traveling was started about the time she reached the door of the sleeper she was so leaving; that by reason of the conduct of the porter, and the facts stated, and the starting ⁴⁸² of the train, she was at the time very much excited, and fell with great force against the framework or fixtures of the Merrill sleeper, on entering the same, on account of which she was seriously bruised and injured; that at the time she was so ejected from the car she had on but little clothing, and her person was exposed to a number of men occupying the Merrill sleeper at the time she entered the same, and they saw her in that condition; that it was raining very hard at the time, and she was exposed to the same in leaving the train;

that she was at the time thirty years of age, and in good health, but pregnant with child; that by reason of the facts stated, she became very ill a few minutes after entering the Merrill sleeper, and had a miscarriage on the same day. From the whole complaint we think it was manifest that the cause of action alleged is for the maltreatment of the plaintiff, and hence is in tort, and is not for a mere breach of contract: *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342; 41 Am. Rep. 41; *Mueller v. Milwaukee Street Ry. Co.*, 86 Wis. 340.

2. It is contended that actionable negligence is not proved, and hence that a verdict should have been directed in favor of the defendant, or else the verdict should have been set aside and a new trial granted. It is enough to say, in answer to such contention, that the evidence in behalf of the plaintiff tends to prove the allegations of the complaint. It also appears that the findings of the jury are supported by the evidence. It was impossible for the defendant, with a train running to La Crosse, to carry the plaintiff to Merrill without her changing cars at New Lisbon. As the plaintiff held the defendant's sleeping-car ticket to New Lisbon, she was necessarily expected to use it by occupying her berth until awakened for the purpose of making such change of cars. To make such change, it became the duty of the defendant, whether stipulated in the contract of carriage or not, to either awaken her in time to make the necessary preparation for such change in a suitable and decent manner, upon ⁴⁵² reaching the station, or, failing to so awaken her before reaching the station, to hold the train at that point for a sufficient length of time to enable her to make such preparation as was necessary to change cars without trepidation or the exposure of her person to the gaze of spectators. The neglect of the defendant to perform such duty, resulting in damage to the plaintiff, under the facts and circumstances stated and found, is sufficient to authorize a recovery, notwithstanding such duty is not expressly prescribed in the contract. These views are supported by numerous adjudications. A few only are cited: *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342; 41 Am. Rep. 41; *Stutz v. Chicago etc. Ry. Co.*, 73 Wis. 147; 9 Am. St. Rep. 769; *Dawson v. Louisville etc. Ry. Co.* (Ky., Feb. 21, 1883), 11 Am. & Eng. R. R. Cas. 134; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468; 23 Am. St. Rep. 356; *Galveston etc. R. R. Co. v. Roemer*, 1 Tex. Civ. App. 191; *Fordyce v. Nix*, 58 Ark. 136; *Kentucky etc. Ry. Co. v. Biddle* (Ky., March 21, 1896), 34 S. W. Rep. 904. Counsel for the defendant cite *Nichols v. Chicago etc. Ry. Co.*, 90 Mich. 208, but it is not in point. In that case the plaintiff had no sleeping-car ticket

The court held that it was the duty of the conductor or brakeman to call out the station, but not to awaken the plaintiff. In that case the plaintiff, after having passed his station, jumped off at a branch track or crossing in the woods, where there were no inhabitants or station agent, and without the knowledge or expectation of any of the trainmen.

3. We perceive no error in allowing the medical experts, who had heard the plaintiff give a part of her testimony in court, and then heard the balance of her testimony read to them by the court reporter, to testify what, in their opinions, was the cause of the miscarriage, assuming the testimony of the plaintiff to be true: *Gates v. Fleischer*, 67 Wis. 504; *Abbot v. Dwinnell*, 74 Wis. 514.

4. We find no reversible error in the portion of the charge to the jury to the effect that by the words "direct and ~~and~~ proximate cause," contained in the special verdict submitted, was meant the cause which naturally led to, and might have been expected to be directly instrumental in producing, the result complained of; that if they found the failure to awaken the plaintiff, so as to give her a reasonable time to dress herself and child (she using due and reasonable diligence) before the train reached New Lisbon, and the treatment she received thereafter, was the cause which, under all the proof, led naturally to, and which might have been expected to be directly instrumental in producing, the injuries which they should find the plaintiff had sustained, then their answer to the sixth question should be "Yes"; otherwise, "No." The criticism is, that the jury were at liberty, under the charge, to answer the question in the affirmative if the defendant or its porter might have expected the result in question, instead of a man of ordinary intelligence and prudence expecting the same; and they cite, in support of their contention, *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 162, 163; 50 Am. Rep. 352. This portion of the charge may be too general, and not as definite and certain as it should have been, in the particular mentioned; but it is substantially the same as the instruction refused in the *Atkinson* case. If the defendant wanted a more definite and certain instruction, it should have been requested. We do not think the jury were misled.

5. Error is assigned because the court charged the jury to the effect that it was the defendant's duty "to use the utmost care and diligence" to see that the "plaintiff was awakened in time," etc. It is conceded that such is the degree of care which the defendant was required to exercise in safely carrying the plaintiff; but it is claimed that the defendant was not required to exercise

the same degree of care in awakening the plaintiff. There may be good ground for the distinction: *Morris v. New York Cent. etc. R. R. Co.*, 106 N. Y. 678; *Palmer v. Pennsylvania Co.*, 111 N. Y. 485 488; *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443. However that may be, the error, if any, was wholly eliminated by the answers to the first, third, and fourth questions of the special verdict, to the effect that the defendant's porter did not awaken the plaintiff, nor attempt to awaken her, nor have good reason to believe that he had awakened her, as above stated: *Goldsworthy v. Linden*, 75 Wis. 25.

6. Error is assigned because the court charged the jury to the effect that, in carrying passengers, railroads are held to the highest degree of care, diligence, and skill consistent with such mode or means of transportation, under the particular circumstances in proof; that they are bound to give passengers reasonable notice of the approach to their station, in order that they may alight; that the jury were, by the fifth question, required to find whether, under the circumstances in this case, the porter used such care in his treatment of the plaintiff after she was awakened and until she was put into the Merrill sleeper at New Lisbon. This last statement sufficiently expresses the nature of the fifth question; and it will be observed that it relates entirely to the degree of care to be exercised by the defendant in safely carrying the plaintiff as a passenger, and hence was not erroneous.

7. Numerous errors are assigned because the court refused to submit several additional questions to the jury, in effect, as to whether the defendant's porter stood in front of the plaintiff's berth at New Lisbon, and opened the curtains of that berth while the plaintiff was awake and sitting up in her berth; whether, by reason of such opening of the curtains, the plaintiff received a nervous shock, which was the direct or proximate cause of her miscarriage; whether, in making the journey from the plaintiff's berth to the Merrill sleeper, the defendant's porter did go ahead of the plaintiff and carry her child; whether the plaintiff, under the attending circumstances, ought to have suffered feelings of shame ⁴⁸⁶ and humiliation by being obliged to go into the presence of strange men with her person covered as it was at the time; whether the failure to awaken the plaintiff was the proximate cause of her injuries; and whether her nervous shock was the proximate cause of her injuries. Such questions all relate to evidentiary facts, and it is admitted, as to some of them. There was no error in any such refusals. As this court has frequently indicated, such special verdict was not designed to elicit from the

jury an abstract of the evidence, and their form is very much in the discretion of the trial court: *Heddles v. Chicago etc. Ry. Co.*, 74 Wis. 257, 258; *Montreal River etc. Co. v. Mibills*, 80 Wis. 551, et seq.

8. Several errors are assigned because the court refused to charge the jury to the effect that the undisputed fact that the porter had awakened all the other passengers who were to change cars at New Lisbon tended to corroborate him in his statement that he did awaken the plaintiff; that, in determining the question of damages, they must not allow anything for any feelings of shame and humiliation, unless they caused or contributed to her bodily injury; that, under the circumstances, the plaintiff's husband would have been a competent witness; and that the failure to call him to contradict the porter's statement that he went into the Merrill sleeper just ahead of the plaintiff, and her husband just behind her, raised the presumption that her husband's testimony would have corroborated the porter. The court had already charged the jury to the effect that, if the plaintiff had "deliberately and knowingly sworn falsely in regard to one material fact in the case," then they were not bound to believe any of her statements, unless corroborated. The question as to the credibility of the witnesses and the weight and effect of their testimony was for the jury: *Benjamin v. Covert*, 55 Wis. 157; *Pool v. Chicago etc. Ry. Co.*, 56 Wis. 227; *Thomas v. Paul*, 87 Wis. 607. The court was not required to cast suspicion and doubt upon the testimony ⁴⁸⁷ of any particular witness: *Valley Lumber Co. v. Smith*, 71 Wis. 304; 5 Am. St. Rep. 216. So far as the request to charge respecting the plaintiff's feelings of shame and humiliation, the giving of it would have been misleading, besides being objectionable under the authorities cited. We find no error in refusing the instructions mentioned.

9. Exception is taken because the court charged the jury that "many of the claims of the plaintiff as to just what occurred have been denied by the defendant's witnesses, and you will be called upon to find the facts you believe to be established by the fair weight of all the evidence, as embodied in the special verdict submitted to you." The criticism is upon the use of the word "fair," but the facts were "to be established by the fair weight of all the evidence." The word "establish" ordinarily means to settle firmly—to fix unalterably; and hence the facts could not be so "established" except by the greater weight or preponderance of the evidence. Manifestly, it was not misleading: *Thomas v. Paul*, 87 Wis. 607.

10. We cannot say that the verdict is so excessive as to create the belief that the jury were misled by passion, prejudice, or ignorance, and hence there was no error in not granting a new trial on that ground: *Corcoran v. Harran*, 55 Wis. 120; *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342; 41 Am. Rep. 41. Other exceptions in the record must be regarded as not of sufficient importance to call for special consideration, and hence are overruled.

By the Court. The judgment of the circuit court is affirmed.

RAILROAD COMPANIES—SLEEPING-CARS—LIABILITY FOR FAILURE TO AWAKEN PASSENGER.—A sleeping-car company is answerable to plaintiff if its servants failed and neglected to awake the plaintiff and his wife in time to enable them to dress and get off the train at the station of their destination: *Pullman Palace Car Co. v. Smith*, 79 Tex. 408; 23 Am. St. Rep. 356. See monographic note to *Pullman Palace Car Co. v. Lowe*, 26 Am. St. Rep. 334, on the obligations and liabilities of sleeping-car companies.

RAILROAD COMPANIES—CARE AND DILIGENCE REQUIRED.—Railways carrying passengers are bound to carry them safely so far as human care and foresight may provide; that is to say, they are bound to use the utmost care and diligence of very cautious persons, and they will be held liable for the slightest negligence which human care, skill, and foresight could have foreseen and guarded against: *Connell v. Chesapeake etc. Ry. Co.*, 93 Va. 44; 57 Am. St. Rep. 786, and note.

NEGLIGENCE—PROXIMATE CAUSE.—To warrant the finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances: *Connell v. Chesapeake etc. Ry. Co.*, 93 Va. 44; 57 Am. St. Rep. 786, and note.

TRIAL—INSTRUCTIONS AS TO WEIGHT OF EVIDENCE.—It is never the province of the court to tell the jury which class of conflicting testimony is entitled to greater weight: *West Chicago Street Ry. Co. v. Mueller*, 165 Ill. 499; 56 Am. St. Rep. 263. The court cannot instruct upon the weight of evidence or the credibility of witnesses: *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859; *State v. Jacob*, 30 S. C. 134; 14 Am. St. Rep. 897.

TRIAL.—A SPECIAL VERDICT SHOULD FIND material facts and not the evidence of those facts: *La Frombois v. Jackson*, 8 Cow. 589; 18 Am. Dec. 463. Facts not included in a special verdict will be presumed not to exist: *Lawrence v. Beaubien*, 2 Bailey, 623; 23 Am. Dec. 155. See note to *Gulf etc. Ry. Co. v. James*, 15 Am. St. Rep. 752, 753.

WITNESSES—OPINIONS OF EXPERTS.—It is proper to allow a physician to testify whether or not certain injuries sustained by plaintiff were, in his opinion, sufficient to produce her miscarriage and to give reasons why this result might follow: *Benjamin v. Holyoke etc. Ry. Co.*, 160 Mass. 3; 39 Am. St. Rep. 446, and note.

MAYO v. HANSEN.

[94 WISCONSIN, 610.]

GARNISHMENT OF OFFICERS OF A CORPORATION UPON A DEMAND AGAINST IT.—An officer or other agent of a private corporation may be garnished by its creditors in respect to moneys or property in his hands belonging to it. Therefore, if the treasurer of a corporation has its moneys in his hands as such when a garnishment against it is served upon him, judgment may be entered against him for the amount of the debt due from the corporation not exceeding such moneys in his hands.

Proceeding by garnishment in the action of Albert G. Mayo and others against the Milwaukee Amusement Company. The garnishment was served upon Hansen, the treasurer of the company, who thereupon disclosed the fact that he had in his possession, in his official capacity, moneys of the company amounting to five hundred dollars, but that he was not in any manner indebted to it, and had no other money or property belonging to it in his possession or under his control. Under these facts it was insisted that a judgment could not be entered against the treasurer under such garnishment, and the trial court having so ruled, the plaintiff in the action appealed.

Edgar L. Wood, for the appellants.

David S. Rose, for the respondent.

¶11 PINNEY, J. 1. The statute under which it is sought to charge the defendant is that the garnishee, from the time of the service of the summons, "shall stand liable to the plaintiff to the amount of the personal property, money, credits, and effects belonging to the defendant, and the amount of his indebtedness to the defendant then due, or to become due, and not by law exempt from sale on execution": Rev. Stats., sec. 3719. The garnishee, at the time of the service of the summons, was the treasurer of the private corporation defendant in the action, and had in his possession, as such, five hundred dollars of the money of such corporation. It does not appear that the corporation had ever demanded that the garnishee should pay or deliver this money to the corporation; and, as between him and the corporation, no cause of action existed, for want of such demand for its delivery to and recovery by such corporation. He held it as its treasurer, and in the discharge of his duties as such. Whether the ¶12 defendant is liable in such case, as garnishee of the corporation, at the suit of its creditor, by reason of having its property in his possession, is a question upon which the authorities are in irreconcilable conflict. By many of the cases it is held that garnish-

ment is a proceeding against third persons; that is to say, that it cannot be maintained against persons who stand in such relation to the defendant that their garnishment is, in fact and effect, but the garnishment of the defendant: Drake on Attachment, sec. 465 a; Waples on Attachment, sec. 454; Rood on Garnishment, secs. 42, 53. Confessedly, the possession by the garnishee in the present case is, in law, the possession of the corporation; and, as to such possession of the corporate funds in the regular disbursement of them, there is great force in the position that he is pro hac vice the corporation itself; but in many such cases treasurers or agents, so holding the money of private corporations, have been charged as garnishees, as in the case of the tollgate keeper, paymaster, treasurer, or station agent of a railroad company, and the like: Rood on Garnishment, sec. 43; Central Plank-Road Co. v. Sammons, 27 Ala. 380; Littleton etc. Bank v. Portland etc. R. R. Co., 58 N. H. 104; Jepson v. International etc. Alliance, 17 R. L. 471; First Nat. Bank v. Burch, 80 Mich. 242; First Nat. Bank v. Davenport etc. R. Co., 45 Iowa, 120; Hughes v. Oregonian Ry. Co., 11 Or. 158; while in similar cases in other states the liability of the garnishee is denied: Fowler v. Pittsburgh etc. R. R. Co., 35 Pa. St. 22; Pettingill v. Androscoggin R. R. Co., 51 Me. 370; Sprague v. Steam Nav. Co., 52 Me. 592; McGraw v. Memphis etc. R. R. Co., 5 Coldw. 434; Mueth v. Schardin, 4 Mo. App. 403; Wilder v. Shea, 13 Bush, 128.

The decisions in this state seem to and perhaps may be fairly said to have established the doctrine in favor of the liability of the garnishee in all such and similar cases. In the case of Ballaton Spa Bank v. Marine Bank, 18 Wis. 493, which was an examination of the president of the Marine ⁶¹³ Bank on proceedings supplemental to execution, Dixon, C. J., disposes of the question that a proceeding to examine the president was a proceeding against the bank itself, and therefore he could not be examined as to the property of the bank in his hands as such president, asserting the more liberal rule in favor of creditors, and said: "There can be no doubt but that the property of a private corporation is liable for its debts, and that whether such property is found in the hands of its president or any other person. The possession is immaterial so far as the question of liability is concerned, for neither the president nor any other officer of the corporation has any right to withhold its property when required to answer the just debts of the corporation. It would be easy indeed for such corporations to avoid the payment of their debts, if placing their property in the hands of their officers was placing it beyond the reach of creditors"; and that Harris, the president,

was to be "regarded as an individual having in his hands property of the bank, liable in law for the satisfaction of its debts, and the fact that he happened at the same time to be its president constitutes no excuse whatever for the refusal to surrender such property," or answer concerning it. In *Curtis v. Bradford*, 33 Wis. 190, a garnishee proceeding against the agent of a Michigan railway company, in an action against the company for a personal injury brought in the courts of this state, was regarded as regular and proper. In *Everdell v. Sheboygan etc. Ry. Co.*, 41 Wis. 395, a proceeding under section 103 of chapter 134 of 2 Taylor's Statutes, quite analogous to the proceeding by garnishment, and which was treated by the court as substantially the same, it was held that the paymaster of the railroad company was subject to such proceeding, in respect to the moneys of the railroad company in his hands as such. And in *Felch v. Eau Pleine etc. Co.*, 58 Wis. 431, the agent of the company ⁶¹⁴ was held liable to garnishment, at the suit of a creditor of such company, in respect to moneys which he had collected and held for it as such agent. In general, an agent holding the property of his principal is subject to garnishment by the creditors of his principal, by reason of the money or property held by him as such agent: *Rood on Garnishment*, sec. 43; *Storm v. Cotzhausen*, 38 Wis. 139; *Greene etc. Co. v. Remington*, 72 Wis. 648.

The fair result of the cases in this state, we think, sustains the contention that an officer or agent of a private corporation may be garnished by its creditors in respect to money or property in his hands belonging to it. The officers or agents of public corporations, or quasi public officers, are not liable to the proceeding in respect to money in their hands as such upon grounds of public policy, but it cannot be fairly said that the liability of an officer or agent of a private corporation is affected by any such considerations any more than that of an agent of a natural person in a similar case. While, in the present case, the garnishee is an officer of the corporation, exercising certain official functions in the internal administration of the affairs of the company, he is still, as to the public, but an authorized agent of the corporation, with more or less extensive powers. When the officer has the actual possession and the physical control of the moneys of the corporation, it would seem to be an unsubstantial refinement to deny the remedy because the debtor himself has a right to control the application and use of the funds. The language of the statute is very broad, and it is a remedial one and should be liberally construed. There can be no sound reason for holding that a private corporation, as a debtor, is entitled to put

its moneys or property into the hands of one of its officers or agents, and enjoy an immunity from the proceedings of creditors to reach it by garnishee process, denied to a natural person who puts his money or property in the hands of his agent. ⁶¹⁵ The objection that sustaining the garnishment in question is to sustain a proceeding which is practically a garnishment of the debtor defendant is really quite technical and without substantial merit.

2. The judgment of the superior court was appealable. The amount involved in that court was the amount of the judgment which the creditor had recovered against the corporation in justice's court, which exceeded one hundred dollars. The question was whether the plaintiff was entitled to have it satisfied out of the moneys actually in the hands of the treasurer, the garnishee. There was no occasion, therefore, for any certificate of the judge of that court to confer jurisdiction of this appeal. We hold, therefore, that the judgment of the superior court is erroneous.

By the Court. The judgment of the superior court is reversed, and the cause is remanded for further proceedings according to law.

GARNISHMENT OF OFFICER OF CORPORATION UPON DEMAND AGAINST IT.—The controlling characteristic of the remedy by garnishment is that the liability of the garnishee must originate in, and be dependent on, contract: *Cunningham v. Baker*, 104 Ala. 100; 53 Am. St. Rep. 27. While in the nature of a proceeding in rem, it is, in effect, an action by the defendant in the plaintiff's name against the garnishee, the purpose and result of which are to subrogate the plaintiff to the rights of the defendant against the garnishee: *Neufelder v. German-American Ins. Co.*, 6 Wash. 836; 36 Am. St. Rep. 100. The treasurer of a corporation is not liable to garnishment of a debt of the corporation, as the funds of the corporation are not at his individual disposal: *Neuer v. O'Fallon*, 18 Mo. 277; 59 Am. Dec. 313. The case just cited is opposed to reason and the weight of authority, as is shown by the opinion in the principal case.

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ACCIDENT.

See Definitions, 2; Homicide, 2.

ACKNOWLEDGMENT.

See Deeds.

ACTIONS.

1. ACTION, WHEN EX DELICTO RATHER THAN EX CONTRACTU.—An action against a railway corporation, the complaint in which alleges the purchase of a railway ticket and the facts necessary to entitle the plaintiff to be carried as a passenger, and that he was ejected from the train against his will, is ex delicto rather than ex contractu. (Louisville etc. R. R. Co. v. Gaines, 465.)

2. ACTION, WHEN FOR TORT RATHER THAN UPON CONTRACT.—A complaint against a railway company alleging that there was an implied contract that the defendant would awaken plaintiff in time to enable her to dress herself and child before reaching a designated station, and to prepare herself to leave the train safely and without haste, and that the defendant neglected to do so, but, waiting until the station was reached, then awoke her, and, refusing to delay the train, forced her from her berth before she could dress, and, refusing her time to put on her clothing, pushed her out of the car into another, exposing her unclad to the gaze of spectators there present, and bruising and injuring her, states a cause of action in tort. (McKeon v. Chicago etc. Ry. Co., 910.)

3. JURISDICTION OF TRANSITORY ACTIONS between aliens may be declined if the cause of action arose in another country. (Eingartner v. Illinois Steel Co., 859.)

4. JURISDICTION OF A TRANSITORY ACTION IN FAVOR OF THE RESIDENTS OF ANOTHER state cannot be declined by the courts of this state, though the cause of action arose in such other state of which both parties to the action were then, and yet are, residents. (Eingartner v. Illinois Steel Co., 859.)

5. JURISDICTION OF TRANSITORY ACTIONS.—An action to recover for injuries to the person of the plaintiff is transitory, and the courts of this state have jurisdiction over it if the defendant is served with process therein, though both parties reside in another state wherein the cause of action arose. (Eingartner v. Illinois Steel Co., 859.)

6. TRANSITORY ACTIONS CALLING FOR THE ENFORCEMENT OF THE LAWS OF ANOTHER STATE.—Jurisdiction of a transitory action cannot be declined by the courts of this state because the right of action accrued in another state, and there is a slight variance between the laws of the two states, not amounting to a fundamental difference of policy. (Eingartner v. Illinois Steel Co., 859.)

7. TRANSITORY ACTIONS, WHEN COURT WILL NOT PERTAIN FOR CAUSE ARISING IN ANOTHER COUNTRY.—The courts of this state will not undertake to administer rights originating

In another state or country under statutes materially different from the laws of this state in relation to the same subject. Hence, our courts will not entertain an action against a foreign railway corporation for injuries resulting to one of its employes in another country during the performance of a contract of service there made, if the laws of such other country are such that our courts must have great difficulty in determining what would be the proper interpretation thereof, and there can be no reasonable certainty that the rights of the parties will be adjudged as they would be if the cause were tried in the courts of the other country. (*Mexican etc. Ry. Co. v. Jackson*, 28.)

8. CITIZENS OF EACH STATE. PRIVILEGES AND IMMUNITIES OF IN OTHER STATES.—The right to go into another state and to sue in its courts upon a cause of action arising in favor of the plaintiff in the state of his residence is a privilege guaranteed to him by section 2 of article 4 of the constitution of the United States. (*Eingartner v. Illinois Steel Co.*, 859.)

9. ELECTION BETWEEN REMEDIES, WHEN IRREVOCABLE.—A man may not take two contradictory positions and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him from going back and electing again. (*Kearney etc. Co. v. Union Pac. Ry. Co.*, 434.)

10. ELECTION OF REMEDIES ON THE PART OF A VENDOR. WHAT IS AND WHEN IRREVOCABLE.—If an action is brought by vendors of goods by the complaint in which they allege themselves to be the absolute owners of the goods, and they thereupon recover possession of and sell them as their own without giving any notice to their vendees, and the plaintiffs afterward amend their complaint by alleging that they had sold the goods and delivered possession to the purchasers, who had shipped them by a common carrier, and they, the plaintiffs, had exercised the right of stoppage in transitu, the complaint as first filed must be deemed an irrevocable election to rescind the sale, and the plaintiffs cannot afterward exercise the right of stoppage in transitu; and if, before such election to rescind was made, the purchaser indorsed the bills of lading to a third person for a valuable consideration, his title is superior to that of the vendors who have thus elected to rescind. (*Kearney etc. Co. v. Union Pac. Ry. Co.*, 434.)

See *Mandamus*, 2.

AFTER-ACQUIRED TITLE.

See *Mortgage*, 1.

AGENCY.

1. AGENCY—FRAUD.—An independent fraud committed by an agent on his own account is beyond the scope of his employment, and bears analogy to a tort committed willfully by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. (*Gunster v. Scranton Illuminating etc. Co.*, 650.)

2. AGENTS' DECLARATIONS, WHEN NOT ADMISSIBLE IN EVIDENCE.—Statements made by the secretary of a corporation to the effect that one of its agents was entitled to certain moneys, and that, in any event, he would see that one-half thereof was turned over to such agent, are not admissible in evidence, unless shown to have been within the scope of his authority. (*Roberts v. Minneapolis etc. Machine Co.*, 777.)

3. CONTRACTS.—A STIPULATION THAT NO ONE HAS AUTHORITY to abridge, add to, or change a contract, or a warranty contained therein, is not binding on the parties, and any competent agent acting for them may waive by parol the provisions of the warranty. (Peterson v. Wood Mowing etc. Co., 399.)

4. STATUTE OF FRAUDS—AGENT'S AUTHORITY TO SELL, WHEN NOT LIMITED BY CONDITIONS RESPECTING THE PURCHASER.—The fact that the owner of lands in authorizing another to sell them for him on credit, added that he expected a mortgage for the unpaid purchase price, and that he wanted a reliable purchaser, one such as the agent thinks will make all payments promptly, does not justify the principal in rejecting a contract of sale because he thinks the purchaser not reliable. The language employed by him indicates that he will permit the agent to determine that question. (Peay v. Seigler, 731.)

5. PRINCIPAL AND AGENT—AGENT'S AUTHORITY TO RETURN PURCHASE MONEY.—An agent having authority to set up a machine and to receive it back in the event it does not work properly and he cannot remedy the defect is authorized, on being notified of a defect which he does not remedy, to return notes which the purchaser has given on account of the purchase price. (Peterson v. Wood Mowing etc. Co., 399.)

6. AGENCY.—NOTICE TO AN AGENT is not to be deemed notice to his principal when the communication of the facts would necessarily prevent the consummation of a fraudulent scheme which the agent is engaged in against such principal. (Gunster v. Scranton Illuminating etc. Co., 650.)

7. AGENCY—NOTICE.—An exception to the general rule that notice to the agent is notice to the principal arises in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as when he acts for himself in his own interest and adversely to that of his principal. (Gunster v. Scranton Illuminating etc. Co., 650.)

8. AGENCY—NOTICE—FRAUD.—If an agent representing two principals concocts a scheme to defraud one of them for the benefit of the other, it is to be presumed that he did not disclose to the principal he intended to cheat the means by which he sought to effect his purpose. (Gunster v. Scranton Illuminating etc. Co., 650.)

9. PRINCIPAL AND AGENT—WAIVER OF WRITTEN NOTICE.—Though a contract for the sale of a machine stipulates that if, when started, it does not work well, written notice shall immediately be given, and that no one is authorized to add to or abridge the warranty, yet if the agent of the seller is present when the trial is made, and knows from his own observation that the machine does not work well, and agrees to return the notes given by the purchaser therefor, this is a waiver of written notice. (Peterson v. Wood Mowing etc. Co., 399.)

10. AGENCY—FRAUD—NOTICE.—If the treasurer of a corporation, who is also vice-president of a bank, makes two notes in the name of the corporation, followed by his own name as treasurer, after which the notes are discounted by the bank, and the corporation given credit for the proceeds, and on the same day the treasurer draws a check "to the order of Dft. N. Y.," signing it in the name of the corporation, followed by his name as treasurer, and this check is charged to the corporation upon the books of the bank, and such treasurer then draws two drafts on New York to his own order in payment of such check, signing them with his own name as vice-president of the bank, and, after receiving the proceeds of such drafts, uses them for his own private purposes, the facts are sufficient to authorize a judgment that as the notes were made by the

treasurer of the corporation as such, and as the check was drawn for the proceeds by such treasurer as such, and as both acts were within his authority, the corporation was liable for the loss, and that the bank was entitled to recover upon the notes. (*Gunster v. Scranton Illuminating etc. Co.*, 650.)

11. NOTICE TO AGENT, WHEN IMPUTED TO PRINCIPAL.—HUSBAND AND WIFE.—If a person having a note and mortgage executed by a husband and wife offers them for sale, and he to whom they were offered declines to purchase them, stating that he would purchase a note and mortgage made directly to himself by the same persons and upon the same property, and thereupon the person thus offering to sell undertakes to procure, and does procure, another note and mortgage as suggested, he in so procuring them must be regarded as the agent of the intending purchaser, and the latter is therefore chargeable with notice of all facts known to such agent. Hence the wife may assert, as against him, the defense that she was a surety merely, if the fact of her suretyship was known to such agent. (*Strickland v. Vance*, 241.)

12. PRINCIPAL AND AGENT, DAMAGES RECOVERABLE BY AGENT FOR BREACH OF AGREEMENT CONFERRING ON HIM EXCLUSIVE AUTHORITY.—If an agreement is made whereby a principal agrees to give his agent exclusive authority to make sales for him within a designated territory, and to pay him as commissions twenty per cent of the purchase price of the property sold, and the principal, disregarding the agreement, makes sales within such territory, the agent, as damages for such breach of agreement, cannot recover twenty per cent of the amount of such sales. His true measure of damages is an amount which will compensate him for the approximate detriment sustained by the breach of the contract, and, in the absence of evidence tending to show that otherwise he would have made the sale himself or that he performed any act with reference thereto, he is entitled to no more than nominal damages. (*Roberts v. Minneapolis etc. Machine Co.*, 777.)

13. DAMAGES, EXEMPLARY, FOR WRONG OF AGENT.—A principal is answerable in exemplary damages for the wrongful and malicious act of his agent where he neither authorizes nor ratifies it. (*Robinson v. Superior etc. Ry. Co.*, 897.)

See Contracts, 9; Corporations, 22-24; Insurance, 7, 43-47, 56, 57; Railroad Companies, 3, 4.

ALIENS.

See Actions, 3.

ALTERATION OF INSTRUMENTS.

1. ALTERATION IN WRITINGS.—After a note is executed, the payee has no right to alter it so as to show that it bears interest from its date instead of from maturity, though such alteration is to conform it to the agreement of the parties, made before its execution. (*Otto v. Halff*, 56.)

2. ALTERATION OF WRITINGS—COLLATERALS, RELEASE OF.—If collaterals are given to secure the payment of a promissory note and the holder's right to enforce it is lost through an alteration of the note by him made after its execution, but under such circumstances that he is entitled to sue upon the original obligation, the collaterals are thereby released. (*Otto v. Halff*, 56.)

3. ALTERATION OF WRITINGS, WHEN DOES NOT DESTROY RIGHT TO SUE UPON ORIGINAL CONSIDERATION.—If the holder of a promissory note makes a material alteration in it after it is executed, but without any intention to defraud and in the

belief that he had a right to make such alteration to conform the writing to the original agreement of the parties, such alteration does not deprive the holder of the right, on the maturity of the note, to elect to disregard it and to sue upon the original obligation, there being no evidence that the note was accepted as payment thereof. (Otto v. Hall, 56.)

4. **NEGOTIABLE INSTRUMENTS—ALTERATION.**—The insertion in a note, by the legal holder, of the name of a bank in a blank space after the words "negotiable and payable at," made merely by way of memorandum, in lead pencil, and in a different handwriting from that in the body of the note is not such an alteration as affects its validity in the hands of such holder, especially when there has been no attempt to treat the note as commercial paper or to transfer it, and the action is brought upon the note in its original form. (Light v. Killinger, 313.)

ANIMALS.

1. **ANIMALS, DUTY OF OWNER TO KEEP IN INCLOSURE.**—The common law which required every man to restrain his cattle, either by tethering or by inclosure has never been in force in Texas, and every owner of land in that state who desires to exclude therefrom any cattle running at large, or in an adjoining pasture, must throw around his own land an inclosure sufficient to exclude all animals of the class intended to be excluded which are of ordinary disposition as to breaking fences or other inclosures. (Clarendon etc. Co. v. McClelland, 70.)

2. **ANIMALS COMMUNICATING DISEASE, LIABILITY OF OWNER FOR.**—The owner of cattle is not liable for their straying on the lands of another through his imperfect fence, and there communicating disease to the latter's cattle, though the former knew that such fence was defective and that his cattle were likely to break through it and to communicate disease. (Clarendon etc. Co. v. McClelland, 70.)

3. **ANIMALS COMMUNICATING DISEASE TO OTHERS, LIABILITY FOR.**—If the owner of cattle knows that they are liable to break through a fence sufficient to keep out animals of their species of ordinary disposition, and knows, or has reason to believe, that they will communicate disease to others of their kind, he is liable if they break through such an inclosure and communicate disease to other cattle therein. (Clarendon etc. Co. v. McClelland, 70.)

4. **ANIMALS COMMUNICATING DISEASE, LIABILITY OF OWNER DEPENDS ON HIS NEGLIGENCE.**—Though the owner of land has thereon a fence sufficient to exclude cattle of ordinary disposition as to fence breaking, he cannot recover of the owner of animals of a vicious and breachy disposition for breaking into such inclosure and communicating disease to animals therein, unless he can show that the owner of the animals thus inflicting injury had notice both of their breachy disposition and of their being in a condition to communicate disease. (Clarendon etc. Co. v. McClelland, 70.)

5. **ANIMALS, TRESPASSING, LIABILITY OF—JURY TRIAL.** It is error to instruct a jury, in an action to recover damages for injuries alleged to have been received by plaintiff through the defendant's cattle breaking into the plaintiff's inclosure and thereby communicating disease to his cattle, that if the defendant had reason to believe that his cattle were liable to communicate disease from the fact that they were driven from a certain locality, then the defendant would be liable for the result of their communicating disease. Such a charge is upon the weight of the evidence. (Clarendon etc. Co. v. McClelland, 70.)

6. NEGLIGENCE IN MAINTAINING FENCES—BURDEN OF PROOF.—In an action by a landowner to recover for injuries alleged to have been received through cattle breaking into his inclosed lands and communicating disease to his cattle therein, in which defendant claims that the negligence of the plaintiff in not maintaining proper fences contributed to his injury, the defendant need not assume the burden of proving the condition of the fences. The plaintiff must prove that his fences were in proper condition, and that his loss was not due to his negligence in maintaining them. (*Clarendon etc. Co. v. McClelland*, 70.)

APPEAL.

1. APPEAL, IMMATERIAL ERROR.—Though a complaint contains matters which do not aid plaintiff, and which are therefore superfluous, any error of the court in overruling a demurrer pointed at these matters is immaterial. (*Prescott v. Edwards*, 186.)

2. APPELLATE PRACTICE—GENERAL ASSIGNMENT OF ERROR.—An assignment of error on appeal that "the court erred in rendering judgment for the defendant" is too general to be considered; it should point out the specific error objected to. (*Klotz v. James*, 348.)

3. TRIAL—ORDER OF—DISCRETION.—The general conduct of a trial, as well as the order in which it shall proceed, is largely within the discretion of the trial court, and it is only when abuse of such discretion is clearly shown that the appellate court may interfere. (*Commonwealth v. Eisenhower*, 670.)

4. APPELLATE PRACTICE—OBJECTION NOT RAISED BELOW.—An objection that a money judgment in replevin includes property not taken under the writ cannot be first made on appeal. (*Klotz v. James*, 348.)

5. APPEAL—NO REVIEW OF OBJECTION NOT RAISED BELOW.—An objection, in an action by a husband against his wife for divorce, to the litigation of the husband's alleged rights in real estate, the title to which is in the name of the wife, cannot be considered on appeal, where the record does not show that the objection was made in the trial court. (*Greene v. Greene*, 560.)

6. APPELLATE PRACTICE—WAIVER OF OBJECTION—REPORT OF REFEREE.—If the report of a referee requires a party, on settlement of partnership affairs, to account for the value of certain property claimed by him as his own, he cannot complain of such report on appeal if he has taken no steps in the court below to place the property at the disposal of the partnership. In such case, he elects to retain the property and to account for its value, and waives the right to object to the referee's report. (*Short v. Taylor*, 508.)

7. LAW OF THE CASE.—While it is true that the rulings of a court upon a prior appeal are ordinarily irrevocable and settle the law of the case, to the enforcement of this rule it is essential that the law as stated on the first appeal be applicable to the facts appearing on the second. (*Louisville etc. R. R. Co. v. Offutt*, 467.)

8. PRACTICE ON APPEAL.—Courts will not indulge in presumptions for the purpose of reversing a judgment. (*Brady v. Krueger*, 771.)

9. PRACTICE ON APPEAL.—A motion to direct a verdict presents a question of law which may be reviewed upon appeal though the bill of exceptions does not contain any specification of the particulars in which the evidence is alleged to be insufficient to support the verdict. (*Brady v. Krueger*, 771.)

10. MURDER—APPELLATE PRACTICE.—IMPROPER REMARKS OF COUNSEL for the prosecution in a murder trial cannot

be reviewed on appeal when attention was not called to them on the trial, and they are not part of the record, although they were embodied in grounds for a new trial. (*Commonwealth v. Eisenhower*, 670.)

11. APPEAL—REVERSAL OF JUDGMENT.—IMPROPER REMARKS OF COUNSEL, during an argument before the jury, do not, unless the court has made some erroneous ruling on the question, constitute a ground for reversal of judgment. (*Murray v. Doud*, 297.)

12. APPEAL—CRIMINAL LAW—EVIDENCE ILLEGALLY ADMITTED—REVERSAL OF JUDGMENT.—The admission of illegal testimony, in a criminal case, is no ground for reversal of judgment, where it plainly appears that it could not have injuriously affected the defendant on the merits of the case. (*Genz v. State*, 619.)

13. APPELLATE PRACTICE.—JUDGMENTS in equity as well as at law should not be reversed unless the reviewing court believes that error has been committed against the complaining party which materially affects the merits of the action. (*Short v. Taylor*, 508.)

14. APPELLATE PRACTICE—FINDINGS.—Under a statute requiring the court, on request, to state a finding of facts in writing separately from the conclusions of law, such findings filed after judgment but as of date thereof are not part of the record nor reviewable on appeal. (*Loewen v. Forsee*, 489.)

15. APPEAL—NO REVIEW AS TO SUFFICIENCY OF FINDINGS.—If a bill of exceptions does not contain all of the evidence, the sufficiency of the evidence to support the findings and decree is not open to consideration on appeal. (*Greene v. Greene*, 560.)

16. APPEAL.—A STIPULATION OF FACTS must be treated in the same way as the evidence would be treated if the witnesses had been called and sworn. Hence the appellate court may, on appeal from the circuit court, under the Illinois system of courts, draw ultimate conclusions from agreed facts the same as from the testimony of witnesses. (*Huyett etc. Co. v. Chicago Edison Co.*, 272.)

17. APPEAL—CONCLUSIVENESS OF FINDINGS ON AGREED FACTS.—Under the Illinois statute, which provides that the appellate court's finding of facts, if different from that of the trial court, shall be final and conclusive when the facts as found are recited in its judgment, the appellate court's finding of facts is final in cases at law tried in the lower court, without a jury, on agreed facts. (*Huyett etc. Co. v. Chicago Edison Co.*, 272.)

18. APPELLATE PRACTICE—REVIEW IN EQUITY CASE.—The supreme court of Missouri has constitutional power to review the facts as well as the law in a suit in equity, but, if any finding of fact depends on the credibility of witnesses, the court should be satisfied that the finding is against the preponderance of evidence before disturbing it. (*Short v. Taylor*, 508.)

19. MURDER—CONDUCT OF TRIAL—PRIVATE COUNSEL.—The action of the trial court in permitting private counsel to close the case for the prosecution in a murder trial is not ground for the reversal of the verdict and judgment. (*Commonwealth v. Eisenhower*, 670.)

20. APPEAL, DUTY TO PROSECUTE.—The sureties on an appeal bond are not released by the failure of the respondent to prosecute an appeal. That duty devolves on the appellant, and his failure to perform it cannot release his sureties. (*Willis v. Chowning*, 842.)

21. APPEAL—OMISSION OF EVIDENCE FROM BILL OF EXCEPTIONS.—A certificate that a bill of exceptions is complete and

contains all the evidence is not conclusive on that point, where the contrary is shown by the bill itself. (*Greene v. Greene*, 560.)

See Insurance, 21.

APPRAISERS.

See Judicial Sales, 2, 3.

ARREST.

ARREST AND SEARCH WITHOUT WARRANT.—Though an officer is given authority by statute, without warrant, to arrest for an offense committed in his presence, he has no right, upon suspicion, nor upon information derived from others, to arrest a citizen and search his person to ascertain whether he is carrying a concealed weapon in violation of law. (*Pickett v. State*, 226.)

ASSIGNMENT.

1. **AN ASSIGNMENT BY AN HEIR OF HIS EXPECTANCY** in the estate of his ancestor was, by the common law, deemed a fraud upon the latter, and the assignee was required to rebut this presumption of fraud, which he might do by proving that the assignment was made without the consent of such ancestor and was free from fraud, unfairness, or inadequacy of consideration. (*Hale v. Hollon*, 819.)

2. **A NAKED POSSIBILITY OR THE EXPECTANCY OF AN HEIR** to an ancestor's estate, or even an anticipated right of a person as next of kin, may be the subject of a contract in equity, which will be equivalent to an assignment of the property, if and when it shall fall into his possession. (*Hale v. Hollon*, 819.)

3. **A CONVEYANCE OF AN HEIR OF HIS EXPECTANCY** in the estate of his ancestor or next of kin is valid as against his creditors. (*Hale v. Hollon*, 819.)

4. **EXPECTANCY IN ESTATE OF INSANE ANCESTOR.**—The fact that an ancestor was insane and did not, and could not, consent to an assignment by an heir of his expectancy in the estate of such ancestor is not fatal to the assignment, and it will be sustained if otherwise fair and free from objectionable features. (*Hale v. Hollon*, 819.)

See Insurance, 29-34; License, 1; Negotiable Instruments, 2, 3.

ASSOCIATIONS.

1. **BENEFICIAL ASSOCIATION.**—A REGULATION that benefits shall be applied for within five weeks after the right thereto accrues is not unreasonable, and must therefore be sustained. (*Robinson v. Templar Lodge*, 193.)

2. **BENEFICIAL ASSOCIATIONS—SICK BENEFITS, DENIAL OF, WHEN CONCLUSIVE.**—If, by the constitution and by-laws of an association, a member is entitled to sick benefits, but is required to submit his claim therefor to the association, and, if aggrieved by its action, to appeal to its grand lodge, whose decision is declared to be final, any member claiming the right to such benefits must pursue his claim therefor in the lodge or grand lodge, and, failing to do so, cannot resort to the courts with success. (*Robinson v. Templar Lodge*, 193.)

3. **BENEFICIAL ASSOCIATIONS—AMENDMENT OF CONSTITUTION AND BY-LAWS.**—If, at the time one becomes a member of an order, its constitution and by-laws expressly reserve the right to make amendments thereto, he is bound by a subsequent amendment injuriously affecting him. (*Robinson v. Templar Lodge*, 193.)

4. BENEFICIAL ASSOCIATIONS — OBLIGATIONS ATTEMPTING TO CHANGE CHARACTER OF.—A declaration in the constitution and by-laws of a beneficial association that its obligations to its members are not contractual, but moral only, and that they do not constitute obligations enforceable by action, cannot change the real character of such obligations. Whether they are contractual or not must be determined from their nature, and not merely by the name given them nor even by the express declaration that they are different from what they, by their terms, appear to be. (Robinson v. Templar Lodge, 193.)

5. BUILDING AND LOAN ASSOCIATIONS, RIGHT TO RECOVER FOR PAYMENTS TO.—A complaint alleging the making of a loan by a building and loan association and the execution in its favor of a note and mortgage, that a specified sum resulting from the collection of insurance on the mortgaged premises was paid into a bank, with the understanding that it would pay to the association the amount due it when that amount was ascertained and the balance to the plaintiff, but that the association demanded and the bank paid a sum greatly in excess of that due, states a cause of action against the association and the bank, though such excess resulted from the exaction of usurious interest. (Pollock v. Building etc. Assn., 695.)

ATTACHMENT.

1. ATTACHMENT.—GARNISHMENT is purely a statutory proceeding, and cannot be extended beyond the statute as construed by the supreme court of the state. (Siegel v. Schueck, 309.)

2. ATTACHMENT—GARNISHMENT—INDIVIDUAL ASSETS OF PARTNERS.—A judgment creditor of a firm cannot reach, by garnishment proceedings based on his judgment, a debt due to an individual member of the partnership. (Siegel v. Schueck, 309.)

3. GARNISHMENT.—AFTER AN APPLICATION FOR A RECEIVER of the defendant's property has been made, and the judge has so acted upon it as to indicate that he will investigate the matter and may appoint a receiver, the property of the defendant must be regarded as in the custody of the law to the extent that no subsequent garnishment of it can be made as against receivers afterward appointed upon such prior application. (Reisner v. Gulf etc. Ry. Co., 84.)

4. GARNISHMENT OF OFFICERS OF A CORPORATION UPON A DEMAND AGAINST IT.—An officer or other agent of a private corporation may be garnished by its creditors in respect to moneys or property in his hands belonging to it. Therefore, if the treasurer of a corporation has its moneys in his hands as such when a garnishment against it is served upon him, judgment may be entered against him for the amount of the debt due from the corporation not exceeding such moneys in his hands. (Mayo v. Hansen, 918.)

ATTORNEY AND CLIENT.

1. ATTORNEY AT LAW ACTING FOR BOTH PARTIES.—If an attorney at law acts for both parties in the preparation of a mortgage, he may act as agent of the mortgagee to accept the delivery of the mortgage. (Jones v. Howard, 231.)

2. ATTORNEY AT LAW, AUTHORITY OF TO RELEASE SURETY ON A DELIVERY BOND.—If an attorney at law agrees with a surety on a delivery bond that if he will procure and deliver to the sheriff the property specified in the bond, the surety shall be released from the judgment and from all claim for damages assessed for the value of the use of the property, the agreement is within the limits of the attorney's authority, and evidence that it

was authorized or ratified by his client is unnecessary, if the property was in fact delivered to the sheriff by the surety. (*Willis v. Chowning*, 842.)

See Notaries Public.

BAILMENT.

A BAILEE OF GOODS FOR AN UNLAWFUL PURPOSE holds them as agent of the bailor until they are applied to such purpose, and until so applied they may be recovered by the bailor. He has the right to withdraw from the illegal scheme at any time before his money or property is applied thereto. (*Wasserman v. Sloss*, 209.)

BANKS AND BANKING.

1. BANKS AND BANKING—CHECKS—SIGNATURE.—The signature of the depositor is the essential feature of a check, and a bank is not bound to pay any attention to the handwriting of the other parts, unless it shows something to excite suspicion. (*Gunster v. Scranton Illuminating etc. Co.*, 650.)

2. BANKS—COLLECTIONS—TRUST FUND—RECEIVER.—If one bank sends a note to another for collection, and the latter, after obtaining the money, but before remitting it, goes into insolvency, and a receiver is appointed, the money so collected is a trust fund, incapable of being commingled with other funds, and must be paid, with interest, out of funds in the receiver's hands before a distribution of assets is made to the general creditors. (*Capital Nat. Bk. v. Coldwater Nat. Bk.*, 572.)

3. BANKS—COLLECTIONS—TRUST FUND—INTEREST.—Under a statute allowing interest at the rate of seven per cent per annum, "on money received to the use of another and retained without the owner's consent, express or implied," that rate may be collected on a trust fund in the shape of money collected by one bank for another, but which has passed into the hands of a receiver of the collecting bank. (*Capital Nat. Bk. v. Coldwater Nat. Bk.*, 572.)

4. SAVINGS BANKS—WAIVER OF LIABILITY OF STOCKHOLDERS.—A stipulation printed at the head of a signature book of a corporation purporting to release its stockholders from liability, and to assent to certain terms upon which loans and deposits will be repaid, is not binding upon the depositors, where they sign their names in the signature book without any intention of becoming bound by the agreement, and without knowledge of its contents. (*Wells v. Black*, 162.)

5. SAVINGS BANKS, DEPOSITORS, RELATION TO.—If a corporation organized as a savings bank and having a capital stock receives deposits which, under the by-laws, consist of two classes, one payable six months after demand, and the other at longer or shorter periods after demand, depending upon the amount to be withdrawn, the depositors receiving such interest as the board of directors determine, and the remaining profits belonging to the stockholders, the relation of debtor and creditor exists between the corporation and its depositors, and its stockholders are answerable for their proportion of the indebtedness due such depositors. (*Wells v. Black*, 162.)

BENEFICIAL ASSOCIATIONS.

See Associations, 1, 2.

BOARDS OF HEALTH.

1. BOARDS OF HEALTH—LIMITATION OF POWERS.—The powers conferred by statute upon a state board of health are limited to the proper enforcement of statutes, or provisions thereof, hav-

ing reference to emergencies requiring action on the part of the agencies of government to preserve the public health and to prevent the spread of contagious or infectious diseases. (Potts v. Breen, 262.)

2. **BOARDS OF HEALTH—LIMITATION OF POWER.**—The power to make rules and regulations for the preservation or improvement of the public health, conferred by statute upon a state board of health, does not authorize it to prescribe conditions upon which citizens may exercise rights and privileges guaranteed by public law. (Potts v. Breen, 262.)

3. **BOARDS OF HEALTH—CONSTRUCTION OF STATUTE.**—A statute creating a state board of health and giving it general supervision over the health and lives of citizens, is to be construed with reference to the specific duties imposed and powers conferred upon the board by the act taken as a whole. (Potts v. Breen, 262.)

4. **BOARDS OF HEALTH.—A GENERAL POWER OF SUPERVISION** over the health and lives of citizens, given by statute to a state board of health, is to be exercised in conformity with law and must be confined, within reasonable limitations, to the performance of administrative duties imposed upon the board by the statute. (Potts v. Breen, 262.)

5. **SCHOOLS—VACCINATION OF CHILDREN—UNREASONABLE REQUIREMENT.**—A rule, adopted by a state board of health, requiring children to be vaccinated as a prerequisite to the exercise of their right to attend public schools, is not a reasonable one, where smallpox does not exist in the community, and there is no cause to apprehend its appearance. (Potts v. Breen, 262.)

6. **VACCINATION OF CHILDREN—RIGHT TO EXCLUDE FROM SCHOOL FOR WANT OF.**—The directors of a public school have no right, either under their own rules, or by order of a state board of health, to exclude children who refuse to be vaccinated, unless it is necessary, in cases of emergency, or reasonably appears to be necessary, to prevent the contagion of small-pox. A remote fear of the disease does not justify such exclusion. (Potts v. Breen, 262.)

BONA FIDE PURCHASER.

See Husband and Wife, 7; Vendor and Purchaser, 6.

BOOKS OF ACCOUNT.

See Chattel Mortgages, 1.

BREACH OF THE PEACE.

BREACH OF THE PEACE, TRUTH OF OPPROBRIOUS WORDS NOT A SUFFICIENT JUSTIFICATION.—In a prosecution for using abusive language tending to cause a breach of the peace, the fact that the words used were true does not constitute a sufficient provocation to justify their use. The only question is whether the language used was calculated to cause a breach of the peace. If so, it is not material whether it was true or false. (Dyer v. State, 228.)

See Criminal Law, 2.

BROKERS.

1. **BROKERS WITHOUT LICENSE—VALIDITY OF CONTRACTS OF.**—A broker's transaction of business, without a license, in violation of a city ordinance, does not invalidate his contracts or affect their character as evidence. (Murray v. Doud, 297.)

2. **BROKERS WITHOUT LICENSE—ACTION ON CONTRACTS MADE BY.**—If a broker negotiates contracts without a

license, in violation of a city ordinance, he may be prosecuted and fined, but this would not invalidate his contracts. Hence, the rule that an action cannot be maintained which is predicated on a transaction prohibited by statute has no application to such contracts. (*Murray v. Doud*, 297.)

3. BROKERS—BUYING AND SELLING STOCKS—SETTLEMENT BY PAYMENT OF DIFFERENCES—EVIDENCE OF INTENTION AS TO DELIVERY.—The intention of parties to a contract for the purchase and sale of stocks in the future is a question of fact to be established, not merely by their assertions, but from the circumstances of the transaction, such as the mode of dealing between the parties, the pecuniary ability of the party purchasing, and the fact that the party making the purchase, or broker, never calls upon the party ordering the purchase for the purchase money, but only for margins. Similar transactions between the parties, settled by the payment of differences, may also be considered. (*Jamieson v. Wallace*, 302.)

4. BROKERS—BUYING AND SELLING STOCKS—PECUNIARY ABILITY OF PURCHASER—EVIDENCE OF INTENTION AS TO DELIVERY.—If a purchase of stocks, ordered through a broker, is much larger in amount than the purchaser is able to pay for, and this fact is known to the broker, it is a strong circumstance indicating no intention of receiving the property, but rather an intention to settle the difference between the market price and the contract price. (*Jamieson v. Wallace*, 302.)

5. BROKERS—BUYING AND SELLING STOCKS—SALE OF SECURITIES—RELIEF IN EQUITY.—If a person enters into a mere gambling contract with his broker for the purchase and sale of stocks in the future, and deposits securities with the broker to cover losses, the broker, in case of loss, is a "winner" of such securities, within the meaning of a criminal statute authorizing a proceeding in chancery to recover from the "winner" money or property lost to him by a gambling transaction. A bill in equity, therefore, lies to compel him to account for securities sold to refund the amount thereof, and to return the unsold collaterals. (*Jamieson v. Wallace*, 302.)

See Contracts, 9, 10.

BUILDING AND LOAN ASSOCIATIONS.

See Associations, 5.

BURDEN OF PROOF.

See Animals, 6; Insurance, 19.

BURGLARY.

CRIMINAL LAW—POSSESSION OF STOLEN PROPERTY
In a prosecution for burglary in entering a house and stealing chickens, the possession by the accused of chickens stolen from the same owner at the same time is not evidence of his guilt of the crime charged, where it does not appear that the chickens of which he was so in possession were any part of those taken from the house. (*King v. State*, 251.)

BY-LAWS.

See Associations, 3, 4; Corporations, 3; Insurance, 35.

CARRIERS.

1. CARRIERS—LIVESTOCK—CONTRACT LIMITING LIABILITY.—A common carrier of livestock cannot, by contract with the

shipper, relieve itself, either in whole or in part, from liability for its own negligence, which results in personal injury, to the shipper while traveling on a free pass and caring for his stock in transit. (Missouri Pac. Ry. Co. v. Tietken, 526.)

2. CARRIERS—INTERSTATE COMMERCE, RIGHT TO LIMIT LIABILITY.—By the laws of Congress a carrier engaged in interstate or foreign commerce may, by contract, limit its liability in cases where it is not shown to have been guilty of negligence, and such limitation is effective, though by the state laws it is not permissible. (Houston etc. Navigation Co. v. Ins. Co. of N. A., 17.)

3. CARRIERS—LIVESTOCK—LIABILITY FOR NEGLIGENCE. While a shipper of livestock, who travels on a free pass and cares for his stock in transit, assumes the risks incidental to taking care of his stock, this does not exonerate the carrier from liability to the shipper for personal injuries negligently caused by the employes of the carrier, as where they urgently direct him, while he is eating lunch at a station, to board a moving train, or be left, and, in trying to carry out the hazardous undertaking, the shipper is injured. (Missouri Pac. Ry. Co. v. Tietken, 526.)

4. CARRIERS, PROPERTY, WHEN COMMENCEES TO BE IN TRANSIT OR IN DEPOT.—If, while cotton is in possession of a compress company for the purpose of being compressed, a common carrier issues a bill of lading binding himself to transport it to a place designated, it cannot be regarded as "in transit," or "in depot" while it remains on the platform of the compress company. (Amory Mfg. Co., v. Gulf etc. Ry. Co., 65.)

5. CONFLICT OF LAWS.—THE LIABILITY OF A CARRIER for injuries to its employes, alleged to have resulted from negligence, should be determined by the laws of the country in which the claim originated. (Mexican etc. Ry. Co. v. Jackson, 28.)

CERTIORARI.

See Courts of Probate, 1.

CHARITIES.

1. WILLS.—A DEVISE FOR A CHARITABLE USE is not so vague, indefinite, and uncertain as to the objects and beneficiaries of the use as to be void where it is to a church, for the tuition of poor children. (Dye v. Beaver Creek Church, 724.)

2. WILLS—DEVISE FOR CHARITABLE USE, WHO MAY TAKE.—A church, though it is an unincorporated association, is capable of taking and holding land as a devise for the tuition of poor children. (Dye v. Beaver Creek Church, 724.)

CHATTEL MORTGAGES.

1. MORTGAGES.—BOOKS OF ACCOUNT MAY BE MORTGAGED, in Iowa, like other personal property, subject to the same requirements as to certainty of description as are mortgages of other personal property. (Davis v. Pitcher, 892.)

2. MORTGAGE OF CHATTELS, TESTS OF SUFFICIENCY OF DESCRIPTION.—That description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property is sufficient. (Davis v. Pitcher, 892.)

3. MORTGAGES OF CHATTELS—DESCRIPTION.—A mortgage of chattels specifying the building in which they are, and purporting to include all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise kept in such building sufficiently describes the books of account and the accounts of the mortgagor subject to the mortgage. (Davis v. Pitcher, 892.)

CITIZENS.

See Actions, 8.

COMMON LAW.

See Animals, 1; Execution, 8.

CONFLICT OF LAWS.

See Carriers, 5; Corporations, 21; Interstate Commerce, 2, 3.

CONSTITUTIONS.

CONSTITUTIONAL LAW—CONSTRUCTION.—A construction of a state constitution which renders meaningless any of its provisions should not be adopted. (State v. Hostetter, 515.)

See Actions, 8; Elections, 1, 2.

CONTEMPT.

1. CONTEMPTS—POWER OF JUSTICES TO PUNISH FOR. At common law and under the statute a justice of the peace has power to punish for contempts committed in his presence while sitting officially, the only difference being that the statute fixes a limitation upon the amount of the punishment. (Coleman v. Roberts, 111.)

2. CONTEMPTS—POWER OF JUSTICES TO PUNISH FOR.—All persons present in a court of a justice of the peace while he is acting judicially, whether in obedience to process or voluntarily as mere bystanders or spectators, are subject to the jurisdiction of the court in so far as is necessary for the preservation of its order and decorum, and if any one of them does any act tending to disturb or obstruct the administration of justice, or to interrupt the due course of the trial, or to impair the respect due the court, he may be thereupon adjudged guilty of contempt of court and forthwith punished without the issue of process or any further examination or proof. (Coleman v. Roberts, 111.)

3. CONTEMPT—FAILURE TO ENTER JUDGMENT—COLLATERAL ATTACK.—If a justice of the peace finds a bystander guilty of contempt during judicial proceedings, and thereupon sentences him, issues a warrant of commitment, and the offender is placed in custody, the fact that such judgment or sentence is not entered on the docket of the court prior to adjournment is a mere error or irregularity not affecting the validity of the judgment, when drawn into question collaterally. (Coleman v. Roberts, 111.)

CONTRACTS.

1. CONTRACT, CONSTRUCTION OF LANGUAGE AGAINST THE PARTY USING IT.—If a written contract reasonably admits of two constructions, that is to be adopted which is least favorable to the party whose language it is. This rule is especially applicable against carriers in construing bills of lading issued by them. (Amory Mfg. Co. v. Gulf, etc. Ry. Co., 65.)

2. CONTRACTS—COMPLETE PERFORMANCE NECESSARY FOR RECOVERY ON ENTIRE CONTRACT.—If the subject matter of an entire contract has been destroyed by fire, or otherwise, without the fault of either party, before the contract is fully performed, there can be no recovery, on a quantum meruit, or otherwise for a part performance thereof. (Huyett etc. Co. v. Chicago Edison Co., 272.)

3. CONTRACT IS ENTIRE, WHEN.—A contract to put in and complete a ventilating system for a given sum of money, all of

which is to be paid in thirty days after acceptance of the work, is an entire contract. (*Huyett etc. Co. v. Chicago Edison Co.*, 272.)

4. **CONTRACTS, CONSTRUCTION OF.—PUNCTUATION** is a most fallible standard by which to interpret a writing, but it may be resorted to when other means fail. (*Amory Mfg. Co. v. Gulf etc. Ry. Co.*, 65.)

5. **CONTRACTS, ILLEGAL, RECOVERING MONEYS ADVANCED UNDER.**—If two or more persons enter into a scheme or contract, immoral, or against public policy, and one gives to the other property to be used in the furtherance of their illegal plan and for the purpose of bribing persons in high official station, and the receiver does not use it for that purpose, but applies it to his own use, he is answerable therefor to the person of whom he thus obtained such property. (*Wasserman v. Sloss*, 209.)

6. **CONTRACTS.—IGNORANCE OF LEGAL OBLIGATIONS** and effects of contracts, into which parties voluntarily enter, fraud not intervening, and of which there is no averment, is not ground for the avoidance of such contracts. (*Georgia Home Ins. Co. v. Wharton*, 129.)

7. **CONTRACTS—FAILURE TO READ—AVOIDANCE.**—Written contracts cannot be avoided by parties signing them on the ground that they did not read them before signing, when an opportunity to read them has been afforded. (*Georgia Home Ins. Co. v. Wharton*, 129.)

8. **BROKERS—BUYING AND SELLING STOCKS.—TO INVALIDATE A CONTRACT** for the purchase and sale of stocks in the future, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling only the differences. (*Jamieson v. Wallace*, 302.)

9. **BROKERS—BUYING AND SELLING STOCKS—UNLAWFUL ACT—AGENCY.**—There is no such thing as agency in the doing of an unlawful act. Hence, both parties to a gambling contract made with a broker to buy and sell stocks are principals. (*Jamieson v. Wallace*, 302.)

10. **BROKERS—BUYING AND SELLING STOCKS—GAMBLING CONTRACT.**—A contract with a broker, authorizing him to buy and sell stocks for the other party in the future, is a gambling contract, and not enforceable, where the parties have no intention of receiving or delivering the property, but do intend to settle accounts by the payment of differences between the contract price of the stocks and their market price when sold. (*Jamieson v. Wallace*, 302.)

11. **CONTRACTS—RATIFICATION OF ILLEGAL CONTRACTS.** The right to avoid a contract on the ground of fraud is a privilege given to the injured party for his own protection, and it may be waived; but he cannot ratify and give validity to an illegal contract. (*Henry Christian B. & L. Assn. v. Walton*, 636.)

12. **CONTRACTS—RATIFICATION OF ILLEGAL CONTRACTS.** If a transaction is contrary to good faith, and the fraud affects individual interests only, ratification is allowed, but, when the fraud is of such character as to involve a crime, the adjustment of which is forbidden by public policy, ratification of the act from which it springs is not permitted. (*Henry Christian B. & L. Assn. v. Walton*, 636.)

13. **CONTRACTS—RESCISSION.—MISREPRESENTATION OF MATERIAL FACTS**, on which the party acting relies, and has a right to rely, whether made willfully and intentionally, or innocently from ignorance, inadvertence, or mistake, avoids a contract which it may have induced, but, in the absence of a relation of trust or

confidence, a misrepresentation of matter of law, or of judgment, equally open to the observation or inquiries of both parties, or of mere opinion, is not a fraud and not ground for avoiding a contract. (*Georgia Home Ins. Co. v. Wharton*, 129.)

14. AN ELECTION TO RESCIND A CONTRACT WAIVES the right to sue upon it. (*Kearney etc. Co. v. Union Pac. Ry. Co.*, 434.)

15. ELECTION.—A CONTRACT OF SALE OBTAINED BY FRAUD is not void, but voidable, and the contract continues until the party defrauded has determined his election by avoiding it, and, when once rightfully determined, it is determined forever, and the bringing of an action to recover the property sold is such an election. (*Kearney etc. Co. v. Union Pac. Ry. Co.*, 434.)

16. EMPLOYER AND EMPLOYEE—CONTRACT FOR FIXED TERM—STATUTE OF FRAUDS.—A contract to employ a person for a fixed term is not illegal nor against public policy, nor is it within the statute of frauds. (*Louisville etc. R. R. Co. v. Offutt*, 467.)

17. DAMAGES—BREACH OF CONTRACT TO BUY GOODS—INTEREST.—“Bought and sold notes” constitute a written contract, and, upon the buyer’s breach thereof to buy goods, the seller may recover legal interest on the amount of money found to be due. (*Murray v. Doud*, 297.)

18. EVIDENCE OF CONTRACT.—“BOUGHT AND SOLD NOTES,” executed by a broker, in the regular course of business, in negotiating a sale, are competent evidence of a contract. (*Murray v. Doud*, 297.)

See Agency, 3; Brokers, 1, 2; Damages, 2; Evidence, 1; Fraud, 1; Master and Servant, 4; Vendor and Purchaser, 2, 3.

CONVERSION.

See Execution, 7.

CORPORATIONS.

1. CORPORATIONS—OBLIGATIONS OF.—Promissory notes signed “York Butter and Cheese Company, by F. A. Bidwell, president, J. D. White, secretary.” are obligations of the corporation, and not of individual members thereof. (*Nebraska Nat. Bk. v. Ferguson*, 522.)

2. CORPORATIONS, DUTY, WHEN NOT IMPOSED UPON BY GRANT OF A PRIVILEGE.—If by a statute, charter, or ordinance a corporation is granted the privilege of doing something, the duty of doing it is not thereby imposed so as to authorize the issuing of a writ of mandamus to compel the exercise of the privilege. (*San Antonio Street Ry. Co. v. State*, 834.)

3. CORPORATIONS—BY-LAWS LIMITING LIABILITY OF STOCKHOLDERS.—A by-law of a corporation seeking to limit the liability of its stockholders to its creditors contravenes the constitution and law of the state, and is therefore void. (*Wells v. Black*, 162.)

4. CORPORATIONS.—THE BORROWING OF MONEY by a corporation for the purpose of purchasing its own stock must be treated as ultra vires, at least, as against lenders who knew of such purpose. (*Adams etc. Co. v. Deyette*, 751.)

5. CORPORATIONS.—THE PURCHASE OF ITS OWN STOCK by a corporation is necessarily a reduction of its capital, condemned by the plainest dictates of sound policy. (*Adams etc. Co. v. Deyette*, 751.)

6. CORPORATIONS—POWER TO TAKE STOCK AS COLLATERAL SECURITY.—A corporation authorized to loan money on real,

chattel, or personal security, to buy, sell, hold, and transfer notes and other securities, and evidences of indebtedness, to make contracts, acquire and transfer property, in like manner as private individuals, has power to accept stock in another corporation as collateral security for signing a note on which the corporation obtains money. (Calumet Paper Co. v. Stotts Investment Co., 362.)

7. CORPORATIONS—SALE OF STOCK TO ANOTHER CORPORATION—RIGHT OF STOCKHOLDER TO ANNUL.—A sale of all its assets and stock by one corporation to another, the purchase price being stock in the latter, may be set aside and annulled by a stockholder in the former corporation who has not assented to, participated in, nor ratified such sale. (Elyton Land Co. v. Dowdell, 105.)

8. CORPORATIONS—RIGHT TO TAKE STOCK IN ANOTHER CORPORATION.—A corporation authorized by its charter "to take stock" in other corporations has no power to effect its own dissolution by sale of all of its assets, and to take the stock of another corporation in payment therefor and for distribution to its shareholders, or to any shareholder, without his consent and contrary to his preference, as he cannot be required arbitrarily to accept anything but money. (Elyton Land Co. v. Dowdell, 105.)

9. CORPORATIONS—SUCCESSION—STATUTE OF FRAUDS. If, after curing defects in its organization, a de jure corporation takes all the property and assumes all the liabilities of the de facto organization, the transaction is not within the statute of frauds. (Calumet Paper Co. v. Stotts Investment Co., 362.)

10. CORPORATIONS—LIABILITY OF NEW, FOR DEBTS OF OLD.—In the absence of a special agreement, a newly organized corporation is not answerable for the debts of an old corporation or firm, to whose business and property it has succeeded, unless it affirmatively appears, from the pleadings and proofs, that the transfer of the property and franchise amounts to a fraud upon the creditors of the old corporation, or the circumstances attending the creation of the new corporation, and its succession to the business, franchise, and property of the old corporation, are such as to warrant a finding that it is a mere continuation of the old corporation under a different name. (Austin v. Tecumseh Nat. Bk., 543.)

11. CORPORATIONS, PREFERENCES BY INSOLVENT.—An insolvent corporation which has ceased to do the business for which it was created cannot so dispose of its assets as to deprive creditors of the fair and just distribution thereof. (Fowler v. Bell, 787.)

12. FOREIGN CORPORATION, MORTGAGE OF INTENDED AS A PREFERENCE.—A mortgage made by a foreign corporation while insolvent and after it has ceased to do business cannot be enforced or foreclosed against property in this state, nor can the judgment of foreclosure be sustained on the ground that the defendant has acquired such title as he has under proceedings which, if sustained, will prevent a fair and just distribution of the property of such corporation situate within this state among its creditors. (Fowler v. Bell, 787.)

13. FOREIGN CORPORATIONS, PREFERENCE BY.—If the laws of the state do not permit its domestic corporations which are insolvent and have ceased doing business to prefer one of their creditors, such preferences made by an insolvent foreign corporation, though valid in the state where made and where the corporation has its domicile, will not be permitted to operate in this state upon property here situated because upon such insolvency the property became a trust fund for the benefit of the creditors of such corporation. (Fowler v. Bell, 787.)

14. CORPORATIONS, UNLAWFUL PREFERENCES.—A judgment confessed by an insolvent corporation in favor of a creditor who loaned it moneys, knowing that they were to be used to purchase its own stock, is an unlawful preference, and will not be permitted to prejudice the rights of other creditors. (Adams etc. Co. v. Deyette, 751.)

15. INSOLVENT CORPORATIONS, PREFERENCES BY.—A judgment confessed by an insolvent corporation with a view to giving a preference to one of its directors is not enforceable as against its other creditors. (Adams etc. Co. v. Deyette, 751.)

16. CORPORATIONS — INJUNCTION — MINORITY STOCKHOLDER, WHEN ENTITLED TO.—A minority stockholder in a corporation, who cannot obtain redress through the directors or stockholders for a corporate wrong of the directors in voting to the corporate officers unreasonable and exorbitant salaries, is entitled to an injunction to restrain and correct such wrong. (Decatur Mineral Land Co. v. Palm, 140.)

17. CORPORATIONS—INJUNCTION TO PREVENT ABUSES—ATTORNEY'S FEE.—If, in a suit by a minority of the stockholders of a corporation to prevent mismanagement of the corporate business, and for an injunction to prevent the payment of unreasonable and exorbitant claims held by its officers for their salaries, and to restrain the directors from voting excessive salaries to such officers, the relief prayed for by injunction is granted, the complainants are entitled to recover a reasonable attorney's fee to be paid by the corporation, but the amount of such fee must be determined from the evidence, and the court cannot take judicial knowledge of the value of the services rendered by such attorney. (Decatur Mineral Land Co. v. Palm, 140.)

18. CORPORATIONS—ACTION BY MINORITY STOCKHOLDER TO REDRESS CORPORATE WRONG—WHAT FACTS MUST BE SHOWN.—To entitle a stockholder in a corporation to maintain an action against it in his own name to redress corporate wrongs he must show by his complaint to the satisfaction of the court that he has sought within the corporation redress of the wrongs alleged, that he has requested the managers or directors to redress such wrongs, and, failing with them, has applied to the stockholders for relief, or, if he has not sought redress within the corporation, he must, with particularity and definiteness, allege facts which constitute a satisfactory excuse therefor; otherwise, his complaint is subject to demurrer. (Decatur Mineral Land Co. v. Palm, 140.)

19. CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—LIABILITY.—A person sued for unpaid stock subscriptions in a corporation, who is a stockholder at the time that the action is commenced, cannot defend on the ground that the plaintiff became a creditor of the corporation after the defendant acquired such stock. (Calumet Paper Co. v. Stotts Investment Co., 362.)

20. CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—LIABILITY.—If a person holds unpaid stock in an insolvent corporation as collateral security for a loan, it is not necessary to prove that he subscribed for the stock, in order to hold him liable for the subscription. (Calumet Paper Co. v. Stotts Investment Co., 362.)

21. FOREIGN CORPORATIONS—COMFY.—A foreign corporation will not be permitted to exercise within the state powers which a domestic corporation is not by law allowed to exercise under the same circumstances. (Fowler v. Bell, 787.)

22. CORPORATIONS.—WHERE THE SERVICE OF PROCESS ON A FOREIGN CORPORATION may be made upon its agent, it is

sufficient to constitute one such agent that he conducted the transaction out of which the action arose, and, if the corporation is a foreign insurance company, service may be made on its local agent who had authority to issue policies, collect premiums, pay losses, etc. (Pollock v. Building etc. Assn., 695.)

23. CORPORATION, FOREIGN, SERVICE OF PROCESS UPON. In South Carolina, service of summons may be made on a foreign corporation, when it has property within the state, or when the cause of action arose therein, by delivering such summons to any of its resident agents, and, where the corporation has held out a person as its agent, it will not, for the purpose of avoiding service of process made upon him, be permitted to prove that he was not its agent, or, though its agent, that his powers were special and not such as to justify the service of process upon him. (Pollock v. Building etc. Assn., 695.)

24. CORPORATION, FOREIGN, APPOINTMENT OF RECEIVER FOR, WHETHER TERMINATES RIGHT TO SERVE PROCESS UPON AGENT.—The appointment of a receiver of the assets of a corporation within the state of its residence does not terminate the authority of an agent of the corporation resident in this state. Therefore, summons issued here against the corporation may be served upon such agent after, as well as before, such appointment. (Pollock v. Building etc. Assn., 695.)

25. CORPORATIONS, STOCKHOLDERS' LIABILITY, WHEN ATTACHES—LIMITATIONS.—The liability of the stockholders in a savings bank to its depositors is incurred at the time of each deposit, and expires by the statutes of California at the end of three years. (Wells v. Black, 162.)

26. CORPORATIONS — JUDGMENT AGAINST—PRESUMPTION.—If, after an abortive attempt to incorporate, a de facto corporation becomes indebted, and subsequently cures the defects in its organization, after which a creditor obtains judgment against it on such indebtedness, it must be presumed that he obtained judgment against the de jure corporation. (Calumet Paper Co. v. Stotts Investment Co., 362.)

27. CORPORATIONS—ESTOPPEL TO DENY EXISTENCE OF—PARTNERSHIP OR INDIVIDUAL LIABILITY.—If a party deals with a company as a corporation, though it is imperfectly organized, sues upon notes made by it, and recovers judgment thereon, he is afterward precluded, in an action upon the same indebtedness, from assailing the existence of the corporation, and insisting upon a partnership or individual liability of its members. (Nebraska Nat. Bk. v. Ferguson, 522.)

See Agency, 2, 10, 11; Attachment, 4; Banks and Banking, 4, 5; Libel, 1, 2; Mandamus, 1; Master and Servant, 7.

COTENANCY.

A COTENANT MAY RECOVER, IN AN ACTION OF EJECTMENT, the whole of the property of the cotenancy as against one in possession thereof without title. (Brady v. Krueger, 771.)

COUNTERCLAIM.

See Setoff.

COURTS OF PROBATE.

1. CERTIORARI.—An order of a court of probate depriving a guardian of the custody of moneys of his ward and directing that they be withdrawn from a bank in which they are on deposit only when authorized by the court, is in excess of its jurisdiction, and may, therefore, be vacated on certiorari. (De Greayer v. Superior Court, 220.)

2. GUARDIAN OR ADMINISTRATOR, RIGHT OF TO CUSTODY OF ASSETS.—An order of a court of probate that moneys of a decedent or of a ward be held by a deposit company and paid out only as authorized by the court is void, where the statute exacts security from guardians and administrators, and gives them a right to the exclusive possession and general care and management of the estates committed to their charge. (*De Greayer v. Superior Court*, 220.)

COVENANT OF WARRANTY.
See *Fraudulent Conveyances*, 2.

CREDITOR'S SUIT.

CREDITOR'S BILL—INDIVIDUAL ASSETS OF PARTNERS.—The proper remedy of a judgment creditor of a partnership who desires to reach debts due to individual members of the firm is a creditor's bill. (*Siegel v. Schueck*, 309.)

CRIMINAL LAW.

1. CRIMINAL LAW, CONSTITUTIONALITY OF.—An act cannot be made criminal which the party committing cannot know in advance whether it is criminal or not. Hence, the making of an unreasonable charge for services cannot be made criminal under a statute creating no test of reasonableness in this respect. (*Louisville etc. R. R. Co. v. Commonwealth*, 457.)

2. CRIMINAL LAW—BREACH OF THE PEACE—QUESTION FOR THE JURY.—It is not sufficient to justify the use of words calculated to lead to a breach of the peace that there was some provocation. The provocation must be sufficient, and whether it was so or not is a question for the jury. (*Dyer v. State*, 223.)

3. CRIMINAL LAW, OFFENSE COMMITTED IN THE PRESENCE OF AN OFFICER, WHAT IS NOT.—Though one has a concealed weapon on his person in violation of law, he cannot be regarded as committing an offense in the presence of an officer where his weapon is not seen, and could not be seen, by the latter except by search of his person. (*Pickett v. State*, 223.)

DAMAGES.

1. DAMAGES, PRESUMPTION OF.—From the carrying away of water from a spring upon the plaintiff's land damage to him is presumed, though not expressly averred. (*Metcalf v. Nelson*, 746.)

2. DAMAGES—BREACH OF CONTRACT TO BUY GOODS.—Upon a breach, by the buyer, of a contract to buy goods, the measure of damages is the difference between the contract price and the market price of the goods at the time of the breach. (*Murray v. Doud*, 297.)

3. DAMAGES, EXEMPLARY, DISCRETION OF JURY.—Though, in an action for tort, the jury may, in their discretion, award exemplary damages, it is not proper to instruct them that the plaintiff is entitled to such damages. The court cannot determine this question, and can only instruct the jury to give such damages as they think proper. (*Robinson v. Superior etc. Ry. Co.*, 897.)

4. DAMAGES FOR ILLNESS, INSTRUCTION CONCERNING. In an action to recover damages for being exposed to, and contracting a contagious disease, an instruction that the plaintiff may recover for loss of time while ill, her medical expenses, and for the pain she has suffered in the past or may have to endure in the future, but that, in order to assess damages for the future, the jury must be satisfied to a reasonable extent, from the evidence, that she will continue to suffer, is not erroneous. It does not justify the giving of

damages for the future which are not reasonably certain to result. (Kliegel v. Aitken, 901.)

See Agency, 12, 13; Libel, 2; Railroad Companies, 10, 11; Setoff, 6; Trespass; Vendor and Purchaser, 1.

DEBTOR AND CREDITOR.

See Suretyship, 4.

DEDICATION.

1. DEDICATION, OFFER OF CAN BE REVOKED.—If a landowner offers to dedicate certain lands as public streets or highways, but they are never used as such and the dedication is never accepted, he may withdraw his offer. (Prescott v. Edwards, 186.)

2. DEDICATION OF LANDS TO PUBLIC USE.—The public must be a party to every dedication. Therefore the platting of lands, recording the plat, and selling lots by reference to it do not constitute a dedication if the public does not accept it, and prior to such acceptance the offer of dedication may be withdrawn. (Prescott v. Edwards, 186.)

3. STREETS, ESTOPPEL OF VENDOR TO DENY DEDICATION OF.—One who goes upon land with a surveyor, and, by stakes marking boundary lines, divides it into small parcels, between which he leaves strips, and to persons contemplating purchasing states that such strips are streets, and who afterward sells and conveys such parcels, not including the streets, is estopped from denying as against his grantees and their successors in interest that the lands included in such strips are streets. (Prescott v. Edwards, 186.)

DEEDS.

1. DEEDS OF QUITCLAIM—PRIORITY.—A quitclaim deed properly recorded, in favor of one who purchases in good faith and without notice of a prior unrecorded conveyance, takes precedence of such conveyance. (Schott v. Dosh, 531.)

2. ACKNOWLEDGMENT—MISTAKE IN CERTIFICATE—VALIDITY OF DEED.—If a deed is actually signed, witnessed, properly acknowledged and delivered, it passes the legal title, for the validity of a conveyance does not depend upon whether it has been recorded. Hence, the rights of a judgment creditor of the grantor are not affected by a mistake of the notary in taking the acknowledgment in one county but certifying, by mistake, that he is a notary public of another county. (Roberts v. Robinson, 567.)

See Powers; Usury, 2.

DEFINITIONS.

1. DEFINITIONS.—TO "LIQUIDATE" a balance means to pay it. (Austin v. Tecumseh Nat. Bank, 543.)

2. ACCIDENT—DEFINITION.—An accident is an unusual or unexpected result attending the operation or performance of a usual or necessary act or event. (Hey v. Guarantor's etc. Co., 644.)

"Disease" or "bodily infirmity." (Meyer v. Fidelity etc. Co., 374.)

"Filing a paper." (Hanover Fire Ins. Co. v. Schrader, 25.)

"Forcible entry." (Lewis v. State, 255.)

"Total loss." (Royal Ins. Co. v. McIntyre, 796.)

"Uncontrollable impulse." (Genz v. State, 619.)

DEVISE.

1. WILLS—DEVISE WHEN NOT VOID FOR UNCERTAINTY. A devise of the testator's property remaining after the payment of his debts to his wife for her to dispose of and live on during her life

time, and, if there is anything left after her decease and burial, then to a specified church, is not void for uncertainty either in subject matter or amount. (Dye v. Beaver Creek Church, 724.)

2. WILLS.—IT IS NOT ANY OBJECTION TO A DEVISE TO A CHURCH that the devise is not germane to the purposes for which it was organized, for, if it be not germane, or for any cause the church association cannot carry out the trust, some other trustee will be appointed. (Dye v. Beaver Creek Church, 724.)

See Charities, 1, 2.

DISEASE.

See Animals, 2-4, 6; Boards of Health; Master and Servant, 1; Negligence, 1.

DISORDERLY HOUSES.

HOUSE OF ILL-FAME—KEEPER OF.—A man who allows other men to visit his house for the purpose of having illicit sexual intercourse with his wife, keeps a house of ill-fame, although no other female lives in or resorts to such house. (State v. Young, 871.)

DUE PROCESS OF LAW.

See Trusts, 1.

EJECTMENT.

EJECTMENT, PLEADING.—A complaint alleging that the plaintiff at a date named was the owner and seised and possessed of certain premises, and that the defendant has unlawfully entered on the second story thereof and ousted and ejected plaintiff therefrom, and has ever since withheld the possession thereof from him, is sufficient as a complaint in ejectment, and does not disclose a cause of action of forcible entry and detainer. (Brady v. Kreuger, 771.)

See Cotenancy.

ELECTION.

See Contracts, 14, 15; Sales, 2.

ELECTION OF REMEDIES.

See Actions, 9, 10.

ELECTIONS.

1. ELECTIONS, CONSTITUTIONAL PROVISIONS AGAINST SPECIAL—MUNICIPAL INDEBTEDNESS.—If a state constitution declares that no more than one election in each year shall be held in the state or in any city, town, district, or county thereof, except as otherwise provided in the constitution, and that all elections for state, county, city, town, or district officers shall be held on the first Tuesday after the first Monday in November, the question of whether a municipality shall issue bonds cannot be submitted to a special election or an election held at any other time than that designated in the constitution. (Belknap v. Louisville, 478.)

2. ELECTIONS, SUBMITTING QUESTION OF INCURRING MUNICIPAL INDEBTEDNESS, EFFECT OF VOTERS NOT EXPRESSING THEIR OPINIONS ON THAT SUBJECT.—If a state constitution provides that no municipality shall become indebted beyond an amount specified without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, and also provides for certain dates upon which all elections shall be held, it is necessary to authorize the incurring of such indebtedness

that two-thirds of all the persons voting at that election vote in favor of the indebtedness. It is not sufficient that two-thirds of the persons voting upon that question vote in the affirmative. (*Belknap v. Louisville*, 478.)

8. ELECTIONS—VACANCY IN OFFICE—BALLOTS.—If a vacancy in office, required to be filled at the next general election, occurs after the regular time for nominations has transpired, the proper parties in authority may make a nomination for such office, but it is the duty of the proper officer preparing the official ballot to cause the name of such office to be placed upon the ballot, whether any nomination is made therefor or not, and, if he fails to perform this duty, the electors are entitled to place on their ballots the name of the office entitled to be thereon, as well as the name of the party voted for such office. (*State v. Hostetter*, 515.)

EMINENT DOMAIN.

EMINENT DOMAIN—TAKING PROPERTY ALREADY DEVOTED TO A PUBLIC USE.—It is not true that property devoted to one public use may not be subjected to another. Hence, a municipal corporation, authorized by its charter to open, widen, extend, and establish public streets and to provide for the condemnation of such real estate as may be necessary for that purpose, and which is authorized to take private property for public streets in the same manner that railway corporations may take real estate necessary for their use, is authorized to extend a public street through railway depot grounds. They must be regarded as private property within the meaning of these words as used in the statute. (*Chicago etc. Ry. Co. v. Starkweather*, 404.)

EMPLOYER AND EMPLOYEE.

See *Contracts*, 16; *Master and Servant*.

EQUITY.

See *Appeal*, 18; *Brokers*, 5; *Injunction*; *Insurance*, 85.

ESTATES OF DECEDENTS.

See *Executors and Administrators*.

ESTOPPEL.

See *Corporations*, 27; *Dedication*, 3; *Husband and Wife*, 4, 9; *Insurance*, 52, 53, 58; *Municipal Corporations*, 2, 8.

EVIDENCE.

1. EVIDENCE, ORAL TO ADD TO WRITTEN CONTRACT.—If by a written agreement, an agent is given the right to sell property of his principal within a designated territory, parol evidence is not admissible to show that such right is exclusive. (*Roberts v. Minneapolis etc. Machine Co.*, 777.)

2. EVIDENCE, SUFFICIENCY OF.—A PARTY IN A CIVIL CASE is not required to establish a fact to the satisfaction of the jury. It is error to so charge. It is sufficient that he establishes his allegations by a preponderance of the evidence. (*Willis v. Chowning*, 842.)

3. RES GESTAE.—WHERE A PERSON IS AUTHORIZED TO HIRE ANOTHER to do service in his family, a member of which is ill, the entire conversation with him at the time of the hiring is admissible as part of the res gestae, but, if he was not authorized to make any representations about the nature of the disease, what he said upon that subject is not admissible as a representation binding upon the person who sent him. (*Kliegel v. Aitken*, 901.)

4. LAWS OF OTHER STATES, PRESUMPTION RESPECTING.—In the absence of evidence to the contrary, the laws of the state of New York are presumed to be the same as those of this state. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

5. LAWS OF OTHER STATES, EVIDENCE OF.—A book which purports to be the Revised Statutes, codes, and general laws of the state of New York, published by a private citizen, containing a printed certificate purporting to be that of the secretary of state, that so much of the matter contained in the book as purports to be a copy of the Revised Statutes is correctly transcribed is not evidence, under section 3718 of the code of Iowa, in the absence of any showing that the book was published under authority of the legislature or is usually received as evidence of the existing laws of that state. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

6. EVIDENCE — PRESUMPTIONS.—If undisputed testimony shows that a gaspipe was properly supported when placed in a building, it is presumed that such support continued until a cause arose to destroy it, and evidence that after an explosion of such gaspipe no support was found does not overcome such presumption. (*Metzger v. Schultz*, 323.)

7. EVIDENCE—BAD CHARACTER—SPECIFIC ACTS.—The bad character of a woman cannot be proved by evidence of specific acts of lewd or immoral conduct on her part with one man five or six years prior to her alleged adultery with another man. (*Robertson v. Hamilton*, 319.)

See Agency, 2; Brokers, 3, 4; Contracts, 18; Executors and Administrators, 11; Homicide, 12-17; Insurance, 3, 26, 55-60; Judgment, 5; Partnership, 2; Railroad Companies, 9; Rape, 3; Sales, 6; Slander; Wills, 3, 4, 5, 6; Witnesses, 4.

EXECUTION.

1. AN EXECUTION WHICH IN that part of it which commands the sheriff to seize goods and chattels omits the name of the person whose property is so directed to be seized is void, though it appears from the whole writ against whom the judgment was rendered, and there can, therefore, be no reasonable doubt whose property should be taken to satisfy it. The sale of the chattels of the defendant proposed to be made under such execution may, therefore, be enjoined. (*Capps v. Leachman*, 830.)

2. THE LEVY OF A WRIT IS NOT COMPLETE unless the property is actually seized or brought so far under subjection that the officer could exercise control over it. It is not sufficient that he, having the writ, appears at the store wherein the goods of the defendant are, and there announces to him that he has come to levy on everything in the house. (*Jones v. Howard*, 231.)

3. EXECUTION, EXEMPTION OF WATCH AS WEARING APPAREL.—Under a statute exempting all the wearing apparel and clothing of a debtor and his family from execution, a gold watch and chain constantly carried by him are exempt. (*Brown v. Edmonds*, 762.)

4. EXEMPTIONS—HEAD OF FAMILY.—A childless widow living alone is not the head of a family so as to entitle her to hold certain personal property exempt from legal process. (*Emerson v. Leonard*, 872.)

5. EXECUTION.—TRUST INTERESTS WERE NOT SUBJECT TO EXECUTION at the common law, but interests held in trust for the debtor were made subject to execution by 29 Charles II, sec. 3. (*Chase v. York Co. Savings Bank*, 48.)

6. EXECUTION, TRUST INTERESTS WHICH ARE NOT SUBJECT TO.—If several persons unite in purchasing real property and causing it to be conveyed to a trustee for the purpose of vesting him with the absolute title, in order that he may dispose of and convey it without the necessity of anyone else joining in the conveyance, and of accounting for the proceeds arising from such sale the persons thus entitled to an accounting have no such interest in the real property as is subject to execution. (*Chase v. York Co. Savings Bank*, 48.)

7. EXECUTION AGAINST THE PERSON MAY ISSUE ON A judgment for the conversion of personal property under the statutes of South Dakota. (*Hormann v. Sherin*, 744.)

8. EXECUTION AGAINST THE PERSON WHERE SEVERAL CAUSES OF ACTION ARE JOINED in a complaint may be issued, if the special verdict shows that the cause found in favor of the plaintiff is one which entitles him to such an execution, though the other cause alleged was of a different character. (*Hormann v. Sherin*, 744.)

9. EXECUTION AGAINST THE PERSON, SPECIAL ORDER OF COURT NOT NECESSARY.—If a judgment is for a cause of action warranting the issuing of an execution against the person of the defendant, the clerk may issue it without any special order from the court or judge, although the defendant has not been previously arrested in the action. (*Hormann v. Sherin*, 744.)

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—POWERS OF SPECIAL ADMINISTRATOR.—Under a statute declaring the powers of a special administrator to be "to collect and preserve the property of the testator or intestate until demanded by an administrator or executor duly authorized to administer the same, when such special letters shall be deemed to be revoked," such special administrator has no power to enter into an agreed case in relation to money of the estate collected by him and to pay it out on a claim under an order of court made in such case. (*State v. Tomlinson*, 335.)

2. EXECUTORS AND ADMINISTRATORS—BOND OF PERSONAL LIABILITY.—A creditor who takes a bond for his debt from an executor or administrator discharges the old debt, and the fact that the executor or administrator calls himself such in the bond is mere surplusage, and he is chargeable only in his own right. (*Estate of Claghorn*, 680.)

3. EXECUTORS AND ADMINISTRATORS—STATUTE OF LIMITATIONS—NEW PROMISE—PERSONAL LIABILITY.—The personal representative of a decedent is not answerable for a cause of action not created by the decedent; and if by a new promise he revives a debt already barred by the statute of limitations, or prolongs the life of one not yet barred, the contract is his own, and he is personally answerable; and though he is not bound to plead such statute when he believes the debt to be unpaid, yet in the distribution of a fund, creditors whose interests are affected can plead it. (*Estate of Claghorn*, 680.)

4. EXECUTORS AND ADMINISTRATORS—STATUTE OF LIMITATIONS—FAILURE TO PLEAD.—If suit is brought against a personal representative of a decedent in his representative capacity on a debt barred by the statute of limitations, and he waives his right to plead it, the judgment therein is *de bonis testatoris* and cannot be questioned thereafter on distribution of the estate. (*Estate of Claghorn*, 680.)

5. EXECUTORS AND ADMINISTRATORS—STATUTE OF LIMITATIONS—VOID PROMISE.—A promise by an executor not to

plead the statute of limitations against a certain creditor when he presents his claim is void and does not bind the estate, the executor, nor another creditor. (Estate of Claghorn, 680.)

6. ESTATES OF DECEDENTS—RIGHTS OF CREDITORS.—If the funds of the estate of a deceased person are not sufficient to pay all of its creditors, each creditor has a right to oppose any other claimant by showing payment of the debt, or that it is barred by the statute of limitations, and the executor cannot bar the creditor's right to plead such statute by refusing to plead it himself. (Estate of Claghorn, 680.)

7. ESTATES OF DECEDENTS, CLAIMS AGAINST WHICH NEED NOT BE PRESENTED.—One having a mechanic's lien against the property of a decedent may foreclose it without first presenting a claim therefor to his administrator or executor. The word "claim," as employed in statutes respecting the estates of decedents, applies only to those demands which are sought to be enforced as a personal liability against the estate, and does not include claims which are sought to be enforced merely as liens against his property. (Fish v. Le Laray, 764.)

8. EXECUTORS AND ADMINISTRATORS—PETITION FOR SALE OF LANDS.—A petition filed in the probate court by administrator de bonis non with the will annexed for the sale of the decedent's lands, which alleges that the estate is owing debts to a certain amount, that the personal property of such estate is insufficient to pay such debts, and that the will of the decedent gives no power to sell his lands for the payment of his debts, is sufficient to confer jurisdiction on the probate court to decree a sale of such lands. (Moore v. Cottingham, 100.)

9. JUDICIAL SALES—NOTICE TO HEIRS.—If lands are sold by an administrator to a third person under a decree of the probate court to pay the debts of the decedent, the heirs of the latter are not entitled to notice of the report of the sale made by the administrator, or his application for a confirmation thereof and for an order to make title to the purchaser. Failure to give such notice does not affect the validity of the sale. (Moore v. Cottingham, 100.)

10. JUDICIAL SALES—COLLATERAL ATTACK.—If a petition filed in the probate court by an administrator asking for the sale of the decedent's land to pay his debts is sufficient to confer jurisdiction on the court to decree a sale of the lands for that purpose, such decree and a sale thereunder are valid as against collateral attacks, notwithstanding irregularities in the supervening proceedings. (Moore v. Cottingham, 100.)

11. JUDICIAL SALES—EVIDENCE OF TITLE UNDER.—If lands have been sold by an administrator for the payment of the decedent's debts under a decree of the probate court directing him to make title to the purchaser, based upon a petition alleging the necessary jurisdictional facts, such petition, order of sale, and deed made by the administrator are admissible in evidence in favor of the purchaser at such sale in an action of ejectment brought against him by the heirs of the decedent. (Moore v. Cottingham, 100.)

See Courts of Probate, 2; Judgment, 10; Suretyship, 3.

EXEMPTIONS.

See Execution.

EXPECTANCIES.

See Assignment.

EXPERT TESTIMONY.

See Witnesses, 2, 3.

FENCES.

See Animals, 1-4.

FILING PAPERS.

FILING OF A PAPER, WHAT CONSTITUTES.—When a paper is deposited with the clerk of a court for the purpose of making it a part of the record in a cause, it is filed, though the clerk, being doubtful as to his power to then file it, enters upon it the fact and time of its receipt, but does not put his file marks thereon until the next day. (*Hanover Fire Ins. Co. v. Shrader*, 25.)

FIXTURES.

MORTGAGES—FIXTURES.—If a mortgagor agrees with a mortgagee to place machinery to a certain amount on the mortgaged premises, and such machinery, when placed thereon, is attached thereto, it becomes a fixture subject to the lien of the mortgage, although some part of it is placed in the building after the mortgage was executed. (*Muehling v. Muehling*, 674.)

FORCIBLE ENTRY AND DETAINER.

1. FORCIBLE ENTRY, WHAT IS.—An entry upon premises in defiance of the occupant, with such a display of force as to reasonably deter him from maintaining his possession, is a forcible entry. (*Lewis v. State*, 255.)

2. FORCIBLE ENTRY, WHAT IS NOT.—A mere invasion of the premises of another during his absence, accompanied by such violence only as was incident to effecting an entry into an unoccupied dwelling-house thereon is but a naked trespass, not indictable as a forcible entry. There can be no forcible entry in the absence of acts naturally tending to excite a breach of the peace. (*Lewis v. State*, 255.)

3. UNDER AN INDICTMENT CHARGING BOTH forcible entry and a forcible detainer, it is essential to sustain a conviction that both offenses be proved. (*Lewis v. State*, 255.)

See Ejectment.

FORFEITURE.

See Insurance, 16, 17, 20, 23; Vendor and Purchaser, 4.

FORGERY.

FORGERY DOES NOT ADMIT OF RATIFICATION.—Hence, if a mortgage upon which an action is founded is a forgery, there can be no ratification of it, and it is not binding on the mortgagor. (*Henry Christian B. & L. Assn. v. Walton*, 636.)

FRANCHISES.

See Mandamus, 4.

FRAUD.

1. FRAUD.—AN ENGAGEMENT OR PROMISE to be fulfilled in the future is not a representation, but the making thereof, having no intention at the time of performing it and made for the purpose of deceiving, constitutes fraud for which a contract may be avoided. (*Ansley v. Bank of Piedmont*, 122.)

2. FRAUD.—MERE EXPRESSION OF OPINION, though acted upon, does not constitute a fraud or give rise to a cause of action. And, generally, representations as to prospective values are mere expressions of opinion. (*Ansley v. Bank of Piedmont*, 122.)

See Agency, 1, 8, 10; Contracts, 13, 15; Judgment, 10; Pleading, 9; Sales, 6; Vendor and Purchaser, 8.

FRAUDULENT CONVEYANCES.

1. GIFT OR VOLUNTARY TRANSFER, WHEN NOT VALID AS AGAINST CREDITORS.—A release of indebtedness executed by a creditor of his debtor without consideration is not valid as against the creditors of the former. (*Bement v. Ohio Valley etc. Co.*, 445.)

2. VOLUNTARY TRANSFERS, WHO MAY ATTACK.—A holder of a covenant of warranty in a conveyance of land must be regarded as a creditor of the warrantor from the date of the deed, though it is not until several years afterward that there is a breach of the covenant. Hence, such covenantee may attack a voluntary conveyance made by his covenantor before the breach of the covenant. (*Bement v. Ohio Valley etc. Co.*, 445.)

See Homestead, 6, 8; Insurance, 82.

GAME LAWS.

GAME LAWS—FISHING WITH "TROT LINE."—Under a statute prohibiting the placing across any body of water a trot line so as to prevent the "free passage of fish up, down, or through" such water, but allowing fish to be taken with hook and line, taking fish with a trot line is not absolutely prohibited. The prohibition is against placing such line in a way to obstruct the free passage of fish. (*Collins v. Bankers' Accident Ins. Co.*, 867.)

GARNISHMENT.

See Attachment.

GIFT.

GIFT, WHEN REVOKED AND CANCELED.—If a father assigns certain indebtedness to his son without any valuable consideration, and, as the result of the subsequent compromise of an action between the debtor and the father, lands are conveyed to the son, who, on his part, agrees to pay such indebtedness to the father, this shows that the former transaction was no longer treated by the parties thereto as a gift, and that the son is liable to the father for the amount agreed to be paid to him. (*Bement v. Ohio Valley etc. Co.*, 445.)

See Fraudulent Conveyances, 1; Limitation of Actions, 2.

GUARDIAN AND WARD.

See Courts of Probate, 1, 2.

HEAD OF FAMILY.

See Execution, 4.

HOMESTEAD

1. HOMESTEAD, CLAIMING TWO DWELLINGS.—If a declaration of homestead is filed on property containing two dwellings, one occupied by the claimant and the other rented to a tenant, the latter cannot be held as part of the homestead. (*In re Ligget*, 190.)

2. HOMESTEAD ON WHICH THE CLAIMANT HAS NEVER RESIDED.—If a husband and wife own adjacent tracts of land, which are cultivated as one farm, he may claim and hold his tract as a homestead, though the house in which he and his family reside is not upon his land, but upon hers. (*Mason v. Columbia Finance etc. Co.*, 451.)

3. HOMESTEAD, INTEREST OR TITLE WHICH MAY BE SUBJECT TO.—Real property held under a contract of purchase, the vendor retaining the legal title, may be the subject of a homestead claim on the part of the purchaser and his wife. (*Lessell v. Goodman*, 435.)

4. HOMESTEAD IN PARTNERSHIP PROPERTY.—The wife of a partner is not entitled, as against another partner, to a homestead in its real property under a statute declaring that each member of a partnership may require its property to be applied to the discharge of its debts, and is a lien upon the shares of the other partners for this purpose and for the payment of any general balance due to him. (*Brady v. Krueger*, 771.)

5. INSOLVENCY PROCEEDINGS—SETTING APART HOMESTEAD.—On an application of an insolvent debtor to have property set aside as a homestead, the court is not precluded by the fact that there is no written opposition to the application from inquiring whether the whole of the property is exempt as a homestead and refusing to set aside such part as is rented out to a tenant and has never been used as a home. (*In re Ligget*, 190.)

6. HOMESTEAD—DEFRAUDING CREDITORS.—A conveyance of a homestead by a husband to his wife cannot be a fraud upon his creditors, because it is not liable to their demand. (*Wells v. Anderson*, 409.)

7. HOMESTEAD.—THE FACT THAT AN INSOLVENT PAYS A MORTGAGE on his homestead out of his assets does not entitle his creditors to subject such homestead, to the extent of such payment, to the satisfaction of their demands, where it appears that the moneys for which the mortgage was given were used in his business and not to improve the homestead or to discharge any pre-existing lien thereon. (*Wells v. Anderson*, 409.)

8. HOMESTEAD—FRAUDULENT ALIENATION—LIEN OF JUDGMENT.—If a judgment debtor and his wife convey their homestead for the purpose of having the grantee transfer it to the wife, the grantee merely holds the title in trust for her, and a deed from him to her does not burden the property with the judgment, though it was entered against the trustee as well as the homestead owner; and, in a suit to subject the land to the payment of the judgment, it is immaterial what motive influenced the homestead owner to convey to his wife, as there can be no fraudulent alienation of homestead property. (*Roberts v. Robinson*, 567.)

9. HOMESTEAD—LIEN OF JUDGMENT.—A judgment is not a lien upon a homestead. (*Roberts v. Robinson*, 567.)

10. HOMESTEAD.—AN ACKNOWLEDGMENT BY A HUSBAND that he has forfeited his contract to purchase land held as a homestead, in which acknowledgment his wife did not join, is void. (*Lessell v. Goodman*, 435.)

11. HOMESTEAD.—A DECREE OF DIVORCE WHICH DESTROYS THE FAMILY destroys the homestead right, and if it purports to set aside certain property to the wife as a homestead, there being no children of the marriage, her interest is subject to execution for subsequently contracted debts. (*Bahn v. Starcke*, 40.)

See Husband and Wife, 6; Marriage and Divorce, 8.

HOMICIDE.

1. MURDER—KILLING BY MISTAKE.—The fact that a person otherwise guilty of murder in the first degree killed another than the person intended does not in any degree lessen his guilt. (*Commonwealth v. Eisenhower*, 670.)

2. MURDER—CAUSE OF DEATH.—A person otherwise guilty of murder cannot escape by showing that the death was the result of an accident occurring in an operation made necessary by his felonious act. (*Commonwealth v. Eisenhower*, 670.)

3. HOMICIDE—UNCONTROLLABLE IMPULSE.—An impulse to kill is not irresistible where it is not controlled so long as the

weapon of death is directed against another, but instantly ceases when the slayer turns it against himself. (*Genz v. State*, 619.)

4. **HOMICIDE—MURDER BY PARAMOUR.**—If a man seeking illicit sexual intercourse with another's wife is interfered with by the husband, whom he kills during the course of such interference with a deadly weapon, with which he has armed himself with intent to kill if necessary to save his own life upon being interfered with, he is guilty of murder in the first degree. (*Dabney v. State*, 92.)

5. **HOMICIDE—ADULTERY AS PROVOCATION.**—Illicit sexual intercourse with the wife of another is such a wrong, and so obviously calculated to bring on a difficulty with the husband, that the law recognizes it as a provocation sufficient to reduce the killing of the adulteress and her paramour by the husband, upon detecting them in the act, to manslaughter. (*Dabney v. State*, 92.)

6. **MURDER, PASSION AROUSED BY DISPUTE AS TO PROPERTY RIGHTS.**—Where there is an honest difference of opinion between parties in respect to their interest in property, the fact that one of them proceeds, against the protest of the other, to assert his rights according to his understanding of them, cannot constitute a sufficient provocation for killing him, nor can it be deemed to excite an irresistible outburst of passion on the part of the slayer, so as to reduce the offense to voluntary manslaughter. (*Sellers v. State*, 253.)

7. **CRIMINAL LAW—INSANITY AS A DEFENSE—HOMICIDE.**—Insanity is not available as a defense to an indictment for murder, if the accused, at the time of the killing, was capable of distinguishing between right and wrong, with respect to that act, and was conscious that the act was one which he ought not to have done, although he might have been impelled by an irresistible impulse to do it. (*Genz v. State*, 619.)

8. **MURDER.—A PERSON ASSAILED IN HIS OWN HOUSE OR PREMISES** can repel force by force, and is not obliged to retreat, but may pursue his adversary until he has secured himself from danger, and if, in a conflict between them, he happens to kill, the killing is justifiable. (*People v. Lewis*, 167.)

9. **MURDER — SELF-DEFENSE.** — NO RETREAT IS REQUIRED of one who is not the aggressor. A true man who is without fault is not obliged to flee from an assault of one who, by violence and surprise, maliciously seeks to take away his life, or to do him enormous bodily harm. (*People v. Lewis*, 167.)

10. **HOMICIDE—MURDER—SELF-DEFENSE.**—One who enters upon the commission of a wrongful act, and, contemplating that another may interfere with his enterprise, arms himself with a deadly weapon with intent to take the life of that other should it become necessary to save his own in the course of such interference, and who in fact does take the life of the interferer, in pursuance of such intent, is guilty of murder in the first degree. (*Dabney v. State*, 92.)

11. **HOMICIDE—SELF-DEFENSE WHEN UNLAWFUL.**—One who provokes a difficulty and by his own wrong contributes to a situation out of which arises a necessity to take the life of another to preserve his own, cannot invoke the doctrine of self-defense to justify a homicide committed under such circumstances. Illicit sexual intercourse with the wife of the party killed is such a wrong as takes away from the slayer the right of self-defense. (*Dabney v. State*, 92.)

12. **CRIMINAL LAW.—EVIDENCE** that the day after a murder the witness met the accused, and that he looked frightened, is admissible as a statement of a collective fact. (*Thornton v. State*, 97.)

13. HOMICIDE—EVIDENCE.—If, on a trial for murder, a memorandum book and pencil found at the scene of the killing are shown to have been the property of the accused, they are admissible in evidence as tending to connect the accused with the killing as the guilty agent. The weight to be given such evidence is for the jury to determine. (Thornton v. State, 97.)

14. MURDER—EVIDENCE OF GOOD CHARACTER—INSTRUCTIONS.—A request to charge, in a murder trial, that "the jury may look at the good character of the defendant with the other evidence in the case, and this good character may of itself be sufficient to generate a reasonable doubt of defendant's guilt, is properly refused as giving undue weight to the fact of defendant's good character. (Dabney v. State, 92.)

15. MURDER—EVIDENCE OF FORMER DIFFICULTY.—If, on a trial for murder, the evidence shows that the deceased was killed by the accused upon being discovered in illicit sexual relations with the wife of the former, evidence that a short time prior to the homicide, or at the time thereof, the deceased attempted to kill his wife is immaterial, irrelevant, and inadmissible. (Dabney v. State, 92.)

16. MURDER—EVIDENCE OF POWDER BURNS.—If, on a trial for murder, the evidence shows that the deceased was killed by being shot as he entered the door of a certain house, a witness, upon being asked, after describing the scene of the killing, "if he saw any powder burns upon the door of said house," may testify as to his familiarity with powder burns, and, that, in his opinion, there were powder burns upon the door of such house. (Dabney v. State, 92.)

17. CRIMINAL LAW—OPINION EVIDENCE—IDENTITY OF PERSON.—A witness in a murder case, who has testified that he knew both the deceased and the accused, and had met them a great many times, is competent to testify that two men passed him on the night of the killing, that he noticed them carefully, and, although, he could not state positively who they were, "in his best opinion" they were the deceased and the accused. (Thornton v. State, 97.)

18. HOMICIDE—INSTRUCTIONS.—A request to charge the jury in a murder case that "the defendant is presumed to be innocent until his guilt is established, and the evidence sufficient to convict should be so clear and convincing as to lead your minds to the conclusion that the accused cannot be guiltless," is erroneous and properly refused. (Thornton v. State, 97.)

19. HOMICIDE—INSTRUCTIONS AS TO CIRCUMSTANTIAL EVIDENCE.—A request to charge the jury in a murder trial that "circumstantial evidence should be just as clear and convincing as where the facts are testified to by eye-witnesses, and in this case should be so clear and convincing as to lead your minds to the conclusion that the defendant is guilty beyond a reasonable doubt," is erroneous and properly refused. (Thornton v. State, 97.)

20. HOMICIDE — INSTRUCTIONS — EVIDENCE OF GOOD CHARACTER.—A request to charge on a murder trial that "the defendant has the right to offer evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a doubt as to his guilt," is erroneous and properly refused. (Thornton v. State, 97.)

21. MURDER.—AN INSTRUCTION to the jury that if, from the evidence, they believe that, without any physical act or demonstration on the part of the decedent, sufficient to warrant him as a reasonable man in the belief that he was in great bodily danger, he fired the fatal shot at, and killed, the decedent, such killing was not

justifiable, correctly states the law, and is applicable to the evidence in the case, if one of the witnesses testifies to facts making it pertinent, though his testimony is contradicted by that of several others. (*People v. Lewis*, 167.)

See Appeal, 10, 19.

HOUSE OF ILL-FAME.

See Disorderly Houses.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE, HIS AGREEMENT TO PAY FOR HER SERVICES.—An agreement between a husband and wife that they will dispense with servants and that she will perform with her own hands the ordinary household duties, for which he will pay her one hundred dollars per annum, is, without consideration, and therefore cannot, as against his creditors, support a conveyance made by him to her in satisfaction of moneys due by the terms of such agreement. Notwithstanding the statutes enlarging the rights of married women, they remain subject to the duty of assuming the ordinary burdens of wifehood. (*Lee v. Savannah Guano Co.*, 243.)

2. HUSBAND AND WIFE, HIS CREDITORS' RIGHT TO HIS EARNINGS AND SERVICES.—If a married woman has property and a business of her own to which her husband contributes his time and labor, thereby improving it and otherwise increasing its productiveness or value, a court of equity will, at the instance of his creditors, inquire and determine what part of the property has thereby become equitably his, and will order such part, exclusive of the homestead and other exemptions, to be sold and applied to the payment of their claims, or will direct such property to be placed in the hands of a receiver to be rented, and the husband's share of the proceeds applied to the payment of his debts. (*Brooks-Waterfield Co. v. Frisbie*, 452.)

3. HUSBAND AND WIFE—CONVEYANCES BETWEEN.—Under a statute authorizing a husband and wife to contract with each other, she may make a valid conveyance of her separate estate directly to him for a valuable consideration in the absence of an abuse of the confidential relations between them. A statute requiring the husband to join in conveyances or encumbrances of the wife's separate estate applies only to conveyances by the wife to a third person other than her husband. (*Osborne v. Cooper*, 117.)

4. HUSBAND AND WIFE—CONVEYANCES BETWEEN—ESTOPPEL OF WIFE TO DENY CONSIDERATION.—If a wife conveys her separate estate directly to her husband for a valuable consideration without disclosing their relationship, or an abuse of the confidential relations between them, and afterward joins her husband in a mortgage of such property to an innocent third person, she is estopped from alleging the invalidity of her deed to her husband or want of consideration therefor. (*Osborne v. Cooper*, 117.)

5. HUSBAND AND WIFE—MORTGAGE OF WIFE'S SEPARATE ESTATE.—A mortgage on her separate real estate made by a wife to secure her husband's debt is void under a statute providing that "the wife shall not directly or indirectly become surety for her husband." (*Osborne v. Cooper*, 117.)

6. HOMESTEAD—DIVORCE.—A wife, upon being divorced from her husband, ceases to have any right to the occupancy of the homestead property, unless such right is given to her in the decree of divorce. (*Brady v. Krueger*, 771.)

7. A BONA FIDE PURCHASER FROM A MARRIED WOMAN having no knowledge of her coverture and her consequent inability

to convey without her husband joining with her is not protected either as against her or her heirs; and she and they may therefore recover of such purchaser or his successor in interest the property so conveyed, though the purchase price was paid to, and retained by, her, and there is no offer to restore it to the purchaser. (Daniel v. Mason, 815.)

8. MARRIED WOMEN—DEFENSE OF SURETYSHIP.—If a husband and wife execute their joint note apparently as makers and without disclosing any suretyship, she cannot assert the defense of suretyship as against any person acquiring the note before maturity without notice that she was not a principal. (Strickland v. Vance, 241.)

9. MARRIED WOMAN, ESTOPPEL AGAINST.—The execution and delivery of a conveyance as a feme sole by a married woman to a person having no knowledge of her coverture, and her receiving and retaining the purchase price, cannot estop her nor her heirs from urging that she was married at the execution of such conveyance, and that it is void because her husband did not join therein. (Daniel v. Mason, 815.)

See Agency, 11; Appeal, 5; Homestead, 2-4, 6, 8, 10; Mechanic's Lien, 2.

INDICTMENT.

INDICTMENT—VARIANCE.—Where words are the gist of an offense, the words themselves must be alleged, but only the substance need be proved. If some of the words are proved as alleged, and the words so proved amount to an indictable offense, it will be sufficient. A variance in a word, or in several words, where the sense is not in any degree changed, is not fatal. (Dyer v. State, 228.)

See Forcible Entry and Detainer, 8.

INJUNCTION.

INJUNCTION AGAINST PUBLIC NUISANCE.—A court of equity has jurisdiction to restrain an existing or threatened public nuisance at the suit of the state or the people of a municipality, or some public officer representing the state of the municipality. (Huron v. Bank of Volga, 769.)

See Corporations, 16, 17; Execution, 1.

INSANITY.

See Homicide, 7.

INSOLVENCY.

See Corporations, 11, 13-15, 20; Homestead, 5, 7; Insurance, 32, 33; Sales, 1.

INSTRUCTIONS.

1. INSTRUCTIONS—ADMISSIONS OF FACT.—An instruction that plaintiff's testimony against his own interest is to be taken as true should not be given unless facts material to the issue have been admitted. (Ephland v. Missouri Pac. Ry. Co., 498.)

2. CRIMINAL LAW—INSTRUCTION TO JURY, OMITTING QUESTION OF JUSTIFICATION.—Where the person sought to be arrested fired at the officer with a pistol, and was indicted for assault with intent to murder and, upon the trial, testimony was introduced to the effect that both parties fired, though it was an issue of fact as to who fired first, it was error to charge: "If you find it would be a case of murder had death ensued, you will find [the

accused] guilty of shooting at another," such charge being erroneous in that it omitted altogether all question of justification on the part of the accused. (*Pickett v. State*, 226.)

3. JURY TRIAL—INSTRUCTION RESPECTING WEIGHT OF EVIDENCE.—An instruction to a jury "that many of the claims of the plaintiff as to just what had occurred have been denied by the defendant's witnesses, and you will be called upon to find the facts you believe to be established by the fair weight of all the evidence" is not erroneous or misleading. (*McKeon v. Chicago etc. Ry. Co.*, 910.) See *Animals*, 5; *Damages*, 4; *Homicide*, 14, 18-21; *Libel*, 6; *Lien*, 2; *Trial*, 8, 9.

INSURANCE.

1. INSURANCE POLICIES MUST BE LIBERALLY CONSTRUED in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity, and where words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

2. INSURANCE—CONSTRUCTION OF CONTRACT.—Policies of fire insurance are to be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy. (*Snyder v. Dwelling-House Ins. Co.*, 625.)

3. INSURANCE—ACCIDENT—CONSTRUCTION OF POLICY. Evidence that the insured staggered before he received a fall resulting in an injury is not conclusive that he had "fits or vertigo," excepted by the policy, if he had been in good health previous to the fall, and expert evidence shows that the staggering might have been produced by other causes. (*Meyer v. Fidelity etc. Co.*, 374.)

4. INSURANCE—ACCIDENT—CONSTRUCTION OF POLICY. The words "disease" and "bodily infirmity," as used in an accident insurance policy excepting liability for injury caused thereby, mean, practically, the same thing; and refer to some ailment or disorder of a somewhat established and settled character, some physical disturbance to which the insured is subject, and of which an attack causing him an injury is, in some measure, a recurrence; and they have no reference to some temporary disorder which is new and unusual, and arises from some sudden and unexpected derangement of the system, though it produces or causes unconsciousness. (*Meyer v. Fidelity etc., Co.*, 374.)

5. CONTRACT, PLACE OF.—AN INSURANCE POLICY which was signed in New York and by which it is agreed that all premiums and losses shall be paid in that state, and that it shall be construed as having been made therein, is a contract thereof, though the assured to whom it was issued resides in another state. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

6. INSURANCE—APPLICATION, WHAT IS A FAILURE TO ANNEX COPY OF TO THE POLICY.—If a copy of the application annexed to the policy does not correctly state the place to which notice of premiums shall be addressed, and omits some of the statements of the assured referring to his past afflictions and all of the examiner's report, the insurer must be deemed to have violated a statute requiring a copy of the application to be annexed to every policy. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

7. INSURANCE—CONSTRUCTION OF STIPULATIONS.—A stipulation, in a policy of fire insurance, that no agent of the company shall have power to waive "any provision or condition"

thereof is, in substance, the same as a stipulation that no agent shall have power to change the "terms and conditions" of the policy. (*Snyder v. Dwelling-House Ins. Co.*, 625.)

8. **INSURANCE AGAINST ACCIDENT—PLEADING.**—If a policy insuring against injury or death from accident states the occupation of the assured, and provides for the recovery of less than the amount of the insurance in case of his injury while pursuing any of the occupations designated in the policy as hazardous, a complaint in an action upon the policy should state in what occupation the assured was engaged at the time of the accident. (*American Accident Co. v. Carson*, 473.)

9. **INSURANCE AGAINST ACCIDENT—LIABILITY WHEN THE ASSURED IS INTENTIONALLY KILLED BY ANOTHER.**—Though among the conditions of a policy insuring against accident is one providing that it shall not extend to, or cover, intentional injuries inflicted by the insured or any other person, or injury or death happening while the assured is insane or under the influence of intoxicating drinks, a recovery may be had for the death of the assured through his being intentionally killed, without this fault, by a third person. (*American Accident Co. v. Carson*, 473.)

10. **INSURANCE—EXCEPTIONS—LIABILITY.**—The exception of one from a number of like causes of damage to or destruction of insured property is a recognition by the insurer of his liability for loss arising from other causes of like nature. (*Hey v. Guarantor's etc. Co.*, 644.)

11. **INSURANCE, LIFE—RENEWABLE POLICY.**—A policy of life insurance which is renewable from quarter to quarter on payment of premiums less the return premium awarded, and providing that, subject to the payment of premiums, it shall be incontestable after two years, except for fraud, in obtaining it, is governed by the ordinary principles applicable to life insurance contracts. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

12. **INSURANCE.—DECLARATIONS AND ADMISSIONS OF THE ASSURED** are not binding upon the beneficiary. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

13. **INSURANCE—MUTUAL BENEFIT SOCIETIES—PARTIES.** If one of the beneficiaries named in a certificate of insurance dies, the surviving beneficiaries may sue alone upon the certificate without joining the administrator of the deceased beneficiary. (*Supreme Lodge etc. v. Portingall*, 296.)

14. **INSURANCE.—ASSESSMENTS TO MEET LIABILITIES** on a policy of accident assessment insurance must be made on the basis of membership at the date of the death or accident. (*Collins v. Bankers' Accident Ins. Co.*, 367.)

15. **INSURANCE—ACCIDENT—ASSESSMENT.**—New members of an accident assessment insurance association are not assessable for losses which occur before they become members, and assessments can be made only on the members liable to pay when the loss occurs. (*Collins v. Bankers' Accident Ins. Co.*, 367.)

16. **INSURANCE—LIFE—FORFEITURE—FAILURE TO PAY PREMIUMS.**—If an insurance company enters into a contract by which it agrees to transfer its membership to another company, and the latter agrees to take such members and reinsure them on the basis of their original applications in the former company on the execution of satisfactory transfer applications, and a member of the former company sends a check for a premium due, and fills out a transfer application, in which he states that he has recently recovered from an attack of pneumonia, but that his health is then fair, the latter company has no right to return his check and reject his application on the ground that it "is not satisfactory on account of physical condition and age," nor to insist that the applicant submit to a medical

examination, and his failure to pay a subsequent premium when it falls due does not forfeit the right to recover on the policy. (National Mut. Ins. Co. v. Home Benefit Soc., 666.)

17. **INSURANCE—LIFE—FORFEITURE—FAILURE TO PAY PREMIUMS.**—If a life insurance company has declared a policy forfeited without authority, and has refused to accept a premium, the fact that the insured subsequently failed to pay premiums as they fell due does not affect the right to recover on the policy. (National Mut. Ins. Co. v. Home Benefit Soc., 666.)

18. **INSURANCE.—THERE IS NO PRESUMPTION THAT THE ASSURED RECEIVED NOTICE** of the maturity of premiums where such notice is not mailed to his address, but is, on the other hand, sent to another city of which he was before that time a resident. (Goodwin v. Provident Savings etc. Assn., 411.)

19. **INSURANCE, PROOF THAT PREMIUMS DEMANDED WERE CORRECT.**—Where the amount of a premium to be paid is variable, and a knowledge of the amount rests peculiarly with the insurer, he must show that the sum which he demanded was correct. (Goodwin v. Provident Savings etc. Assn., 411.)

20. **INSURANCE.—A NOTICE OF THE MATURITY OF A PREMIUM** which is improperly addressed and does not reach the assured cannot establish a forfeiture. (Goodwin v. Provident Savings etc. Assn., 411.)

21. **INSURANCE—MUTUAL BENEFIT SOCIETIES—APPEAL WANT OF JURISDICTION** does away with the obligation to seek relief by appeal even when required by the constitution of a mutual benefit association, such as a lodge of the Knights of Pythias, in otherwise proper cases. The duty of an expelled member to exhaust by appeal, or otherwise, all the remedies within the organization arises only where the association is acting strictly within the scope of its powers. (Supreme Lodge K. of P. v. Eskholme, 609.)

22. **INSURANCE—MUTUAL BENEFIT SOCIETIES—EFFECT OF ILLEGAL EXPULSION.**—A vote, in a mutual benefit society, such as the Knights of Pythias, to suspend a member indefinitely is, in effect, a vote to expel, and no jurisdiction is acquired, in either case, without proper notice of the appointment of a committee of trial, and where the proceedings have been otherwise irregular. Hence, he may recover upon a certificate of insurance issued to him by the lodge, where he has not been convicted in accordance with the rules of the society, nor under general principles of law, as his membership still continues. (Supreme Lodge K. of P. v. Eskholme, 609.)

23. **INSURANCE.—A REINSTATEMENT** of the insured after a forfeiture is not the making of a new contract where no different terms are agreed upon. It simply restores the old contracts, and the fact that the reinstatement occurred in a state different from that in which the policy was issued does not make it a contract of the state wherein the reinstatement took place. (Goodwin v. Provident Savings etc. Assn., 411.)

24. **INSURANCE, REINSTATEMENTS, APPLICATION. COPY OF WHEN MUST BE ANNEXED TO.**—If a statute provides that all insurance corporations or associations shall, upon the issuing of a renewal of a policy, attach to, or indorse thereon, a true copy of any application or representation of the insured which, by the policy, is made a part thereof, and, on failing to do so, that the insurer shall not be permitted to prove any such application or representation, a reinstatement after forfeiture falls within the statute, and the insurer cannot plead any representation or application not attached to the policy or to the reinstatement. (Goodwin v. Provident Savings etc. Assn., 411.)

25. CONTRACTS—INSURANCE SETTLEMENT—RESCISSION. If a claim for loss of an insured stock of goods has been adjusted and settled between the parties thereto, and the insurer has paid the amount agreed upon, and the insured has given his receipt therefor, the fact that the insured was ignorant of contracts of insurance and of the proper basis for adjusting losses, and was so hurried in the settlement in the absence of counsel that he signed the settlement without reading it, is not ground for a rescission of the settlement and a restoration of the insured to his rights under the policy, when the absence of, or a desire to consult with, counsel is not communicated to the insurer, and the haste of the insured in making the settlement cannot be attributed to any act of the former. (*Georgia Home Ins. Co. v. Wharton*, 129.)

26. CONTRACTS — INSURANCE SETTLEMENT — RESCISSION—EVIDENCE.—In an action to rescind a settlement of insurance loss made between the insured, the defendant insurer, and other insurance companies, a letter written by an agent of an insurer other than the defendant is not admissible in evidence against him, although such agent was present at the settlement. (*Georgia Home Ins. Co. v. Wharton*, 129.)

27. CONTRACTS — INSURANCE SETTLEMENTS — RESCISSION.—Settlements or adjustments of insurance losses by agreement of the insurer and the insured, when fully performed, have all the elements and properties of a contract, and, in the absence of fraud, are as incapable of rescission as any other contract. (*Georgia Home Ins. Co. v. Wharton*, 129.)

28. CONTRACTS — INSURANCE SETTLEMENT — RESCISSION.—Affirmation or misrepresentation by an insurer of matters of law or of judgment, or mere expression of opinion inducing a settlement of loss between himself and the insured, the facts being open equally to the observation and inquiry of both parties, is not ground for the rescission of the settlement into which the parties have entered, and which has been fully executed by performance on the part of the insurer. (*Georgia Home Ins. Co. v. Wharton*, 129.)

29. INSURANCE—ASSIGNMENT.—A life insurance policy is a chose in action and may be assigned. (*State v. Tomlinson*, 335.)

30. INSURANCE—ORAL ASSIGNMENT.—A parol assignment of a life insurance policy, made by the insured to his wife, is valid if the policy does not declare an assignment without the consent of the company void. (*State v. Tomlinson*, 335.)

31. INSURANCE—EQUITABLE ASSIGNMENT.—If an insured instructs the general agent of the life insurance company by letter to change his policy payable to his estate so as to make it payable to his wife, an equitable assignment of the policy is effected, although such change is not made until after the death of the insured. (*State v. Tomlinson*, 335.)

32. INSURANCE—ASSIGNMENT—INSOLVENCY.—If a person takes out a policy of insurance on his life and subsequently assigns it to his wife, child, or other dependent relative, the mere fact that the assignor is insolvent at the time of making the assignment does not warrant the inference that the assignment was in fraud of his creditors. (*State v. Tomlinson*, 335.)

33. INSURANCE—ASSIGNMENT — INSOLVENCY.—An assignment by an insolvent husband of his life insurance policy to his wife is valid as against his creditors, although the policy was taken out only two years before such assignment and the death of the insured. (*State v. Tomlinson*, 335.)

34. INSURANCE—LIFE—ASSIGNMENT OF.—If it appears in evidence that an insured during his lifetime had executed a regular as-

assignment in writing and under seal to his wife of insurance policies on his life, and that when on his deathbed he informed witnesses that he had transferred his life insurance to his wife, requesting his brother to get such insurance as soon as possible, as his wife would need the money, and stating that the assignment and policies were in his safe among his private papers, where they were found after his death in an envelope with his wife's name indorsed thereon, the evidence is sufficient to authorize a finding or verdict of an assignment of the policies and a sufficient delivery thereof. (*Kulp v. March*, 687.)

35. **INSURANCE—CHANGE OF BENEFICIARY.**—Although, generally, the insured is bound to make a change of his beneficiary in the manner pointed out by the policy and by-laws of the association, yet if it is beyond his power to comply literally with such regulations, a court of equity may treat the change as having been legally made. (*State v. Tomlinson*, 835.)

36. **INSURANCE—PRESUMPTION AS TO NATURAL PERILS.**—An insurance company is presumed to know that which is obvious in regard to the property insured, including the natural perils to which it is exposed, such as the fact that it is situated on the bank of a river. (*Hey v. Guarantor's etc. Co.*, 644.)

37. **INSURANCE—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.**—Going out in a boat to fish on a dark night in water that is dangerous because of sunken trees or snags unknown to the fisherman is not a voluntary exposure to unnecessary danger within the meaning of that term in a policy of life insurance, and does not defeat the right to recover such insurance. (*Collins v. Bankers' Accident Ins. Co.*, 367.)

38. **INSURANCE—ACCIDENTAL INJURY.**—The killing of the assured by a third person, though intentional, is deemed accidental within the meaning of an insurance policy, if the injury was not brought about by the agency of the assured. (*American Accident Co. v. Carson*, 473.)

39. **INSURANCE—ACCIDENT—VIOLENT, EXTERNAL, AND ACCIDENTAL MEANS.**—If a temporary and unexpected physical disorder causes the insured to fall and injure himself, the injury is received through violent, external, and accidental means, and the insurance company is liable therefor. (*Meyer v. Fidelity etc. Co.*, 374.)

40. **INSURANCE—ACCIDENT—FLOOD.**—Damage to insured property from a "sudden rise of the water," or a flood, is damage by accident within the meaning of an insurance policy indemnifying against loss from any accidental damage, "excepting only damage by fire or lightning." (*Hey v. Guarantor's etc. Co.*, 644.)

41. **INSURANCE, LIFE, SUICIDE AFTER TWO YEARS.**—Though an application for life insurance stipulates that the insurer shall not assume liability for death of the insured by his own hand, yet if the policy declares that, subject to the stipulations requiring the payment of premiums on extrahazardous occupations, a claim under the policy by death occurring more than two years after its date shall be incontestable except for fraud in obtaining the policy, the insurer is liable for the death of the insured by his own hand occurring more than two years after the issuing of the policy. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

42. **INSURANCE—CLAUSE AS TO USE OF KEROSENE OIL—CONSTRUCTION.**—A policy of fire insurance is not avoided by the use of kerosene oil otherwise than in lamps for illuminating purposes, where the policy provides that "kerosene oil of legal standard may be used for lights only, provided the oil be drawn and the lamps be trimmed and filled solely by daylight," as this restriction is merely

a regulation of the use of kerosene oil where used for lighting purposes, and will not be construed to prohibit its use for any other purpose than for lights. (*Snyder v. Dwelling-House Ins. Co.*, 625.)

43. **INSURANCE—STIPULATION AS TO WAIVER—LOSS.**—A stipulation, in a policy of fire insurance, that no agent of the company shall have power to waive "any provision or condition" thereof, applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue upon his contract. Hence, after a loss has happened, conditions in the policy with respect to notice of loss and preliminary proofs may be waived by parol, although the policy contains such a stipulation. (*Snyder v. Dwelling-House Ins. Co.*, 625.)

44. **INSURANCE—NOTICE GIVEN TO AGENT.**—Evidence is properly received of directions given by the insured to his agent to procure a policy for him, if it further appears that such directions were communicated to an agent of the insured. (*Graham v. Fire Ins. Co.*, 707.)

45. **INSURANCE—AGENTS—POWER OF—WAIVER.**—A local insurance agent, intrusted with policies of fire insurance in blank, and authorized to issue them upon the application of parties seeking insurance, is thereby clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto. (*Snyder v. Dwelling-House Ins. Co.*, 625.)

46. **INSURANCE.—NOTICE GIVEN A BANK,** which has authority from the insurer to collect and receive premiums and to issue receipts therefor, of a change in the postoffice address of the assured is binding on the insurer. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

47. **INSURANCE.—A NOTICE OF THE CHANGE** of the post-office address of the insured given to an agent of the insurer upon the street, and not in his office, is sufficient to bind his principal. The place where the notice is given is immaterial. (*Goodwin v. Provident Savings etc. Assn.*, 411.)

48. **INSURANCE—CONCEALMENT OF MATERIAL FACTS.**—In the absence of express stipulation, and where no inquiry is made, a failure to state facts known to the insured or his agent, or which he ought to know, is no concealment. Failure to state that property insured is situated on the bank of a river is not a concealment of a material fact. (*Hey v. Guarantors' etc. Co.*, 644.)

49. **INSURANCE. TOTAL LOSS, WHAT IS NOT.**—There can be no total loss of a building so long as what remains is reasonably adapted for use and as a basis upon which to restore the building to the condition in which it was before the injury, and whether it is so adapted depends upon whether a reasonably prudent and uninsured owner, desiring such a structure as the one in question was before injured, would, in proceeding to restore the building to its usual condition, utilize such remnant as such basis. (*Royal Ins. Co. v. McIntyre*, 793.)

50. **INSURANCE—TOTAL LOSS—COMPLETE DESTRUCTION NOT ESSENTIAL TO.**—An insured building may be a total loss from the peril insured against, though it is not wholly destroyed, if what remains is not valuable as a building, and must be regarded as mere debris, though, as such, it has some value. (*Royal Ins. Co. v. McIntyre*, 796.)

ties on their official bonds are subject to private actions for errors of judgment on the part of such justices when acting judicially, nor for corrupt abuse of official authority. (Coleman v. Roberts, 111.)

2. JUSTICE OF THE PEACE, PRESUMPTION IN FAVOR OF JURISDICTION.—In a collateral attack upon the judgment of a justice of the peace, the burden must be assumed by the attacking party of showing that the justice did not have jurisdiction of the defendant. (Hambel v. Davis, 46.)

See Contempt, 1-3.

LACHES.

See Municipal Corporations, 2.

LAW OF THE CASE.

See Appeal, 7.

LAWS OF OTHER STATES.

See Evidence, 4, 5.

LANDLORD AND TENANT

LANDLORD AND TENANT—LIABILITY FOR DEFECTIVE PREMISES.—A landlord is not liable for an injury to an employé of his tenant resulting from defective plumbing on the leased premises performed by a competent and skillful mechanic voluntarily employed by a prior tenant, provided the defects were not apparent, not within the knowledge of the landlord, and of such nature that he could not have known of them in the exercise of reasonable diligence. (Metzger v. Schultz, 823.)

LEGISLATURE.

See Mechanic's Lien, 2.

LEVY.

See Execution, 2.

LIBEL.

1. LIBEL.—A CORPORATION engaged in publishing a newspaper is answerable to a person libeled therein, to the same extent that an individual would be in making such a publication, where the evidence plainly justifies an inference that the libelous article was received, edited, and published by some agent of the company employed for that purpose. (Hoboken Printing etc. Co. v. Kahn, 585.)

2. LIBEL—CORPORATIONS—EXEMPLARY DAMAGES.—If a corporation engaged in publishing a newspaper libels a person therein by an article containing charges of dishonest, fraudulent, and criminal conduct, and, upon a retraction being demanded, publishes a second article which may be construed as a covert and evasive reiteration of the original charge, it is not error, in an action for the libel, to refuse to instruct the jury that no damages of a punitive or exemplary character can be allowed. (Hoboken Printing etc. Co. v. Kahn, 585.)

3. LIBEL IN PROCEEDINGS BEFORE A CITY COUNCIL.—A report of the proceedings of a city council including the remarks made by a person there in attendance, if libelous, is not privileged, if there is no law requiring the publication of such report or remarks. (Buckstaff v. Hicks, 853.)

4. LIBEL, WHEN NOT PRIVILEGED.—The publication of libelous remarks made by a person in attendance before a meeting of

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2. LIMITATION.—A GIFT BY WHICH ONE PERSON stipulates to pay to another a debt due to the latter from a third person continues to be a subsisting liability, under the statutes of Kentucky, for fifteen years. (Bement v. Ohio Valley etc. Co., 445.)

See Corporation, 25; Executors and Administrators, 8-5; Mandamus, 2, 3; Mortgage, 3; Railroad Companies, 13; Suretyship, 9.

LIQUIDATE.

See Definitions, 1.

MANDAMUS.

1. MANDAMUS MAY ISSUE TO COMPEL A CORPORATION to perform a duty imposed by statute. Such duty may be prescribed by the express terms of the statute or charter, or, without being so expressed, may be implied as a fair implication therefrom. (San Antonio Street Ry. Co. v. State, 831.)

2. MANDAMUS—LIMITATIONS.—A proceeding in mandamus between private parties to enforce a moneyed obligation, where there is no statutory provision giving it a different character, is generally considered an action at law, in which case the ordinary rules of practice, including the statute of limitations, apply. (Barnes v. Glide, 153.)

3. LIMITATIONS.—MANDAMUS TO COMPEL THE PAYMENT OF SWAMP LAND WARRANTS will not issue where such warrants have been drawn for more than fourteen years, and the longest period allowed by the code for bringing a civil action, other than for the recovery of real property, is four years. (Barnes v. Glide, 153.)

4. STREET RAILWAYS.—MANDAMUS DOES NOT LIE TO COMPEL A STREET RAILWAY corporation to continue the operation of its lines as they have been constructed and operated, if the statute or ordinance granting it the right to construct and operate such lines purports to grant a privilege rather than impose a duty, and it is not material that the corporation accepted the privilege, and, for a time, exercised the franchise thereby granted. The only remedy is by a proceeding to forfeit the franchise. (San Antonio Street Ry. Co. v. State, 834.)

See Corporations, 2.

MARITIME LIENS.

See Shipping.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—HUSBAND, RIGHT OF TO ALIMONY.—A husband is never entitled to alimony. (Green v. Greene, 560.)

2. MARRIAGE AND DIVORCE—HUSBAND'S RIGHT TO ALIMONY.—A statute giving a wife a right to institute an action for divorce, does not confer upon the husband a right, in such action, to obtain alimony and maintenance, to be paid from the estate of the plaintiff. (Greene v. Greene, 560.)

3. DIVORCE, EFFECT OF UPON WIFE'S PROPERTY RIGHTS.—When the relation of husband and wife is terminated by divorce, she ceases to have any claim upon, or right in, his property whether homestead or otherwise, unless such right is preserved to her by the decree of divorce. Whenever thereafter she seeks to assert any claim of any character in any part of the husband's property, she must establish her right by such decree or by valid contract between herself and him. (Brady v. Krueger, 771.)

4. DECREE FOR ALIMONY, ACTION UPON.—If a decree awarding alimony has the effect of a judgment at law in the state wherein it was entered, an action at law may be maintained thereon in another state. (*Kunze v. Kunze*, 857.)

See Homestead, 11.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT, EXPOSING SERVANT TO CONTAGIOUS DISEASE.—If a master exposes a servant, without warning, to a contagious or infectious disease, the latter not knowing of the danger, nor being able to know of it by the exercise of ordinary care, the master is answerable for the resulting injury to his servant, if the master knew, or by the exercise of ordinary care ought to have known, of the peril. (*Killegel v. Aitken*, 901.)

2. MASTER AND SERVANT—LIABILITY FOR TORTS OF SERVANT—SCOPE OF EMPLOYMENT.—While a master is liable only for such wrongs of his servant as are committed in the course of the employment and for the master's benefit, yet the scope of such employment may be implied from its nature and the end to be accomplished. (*Ephland v. Missouri Pac. Ry. Co.*, 438.)

3. EMPLOYER AND EMPLOYÉ, DISCHARGE FROM EMPLOYMENT CANNOT BE RETROACTIVE.—If one is employed as a freight conductor by a railway corporation, placed on its pay-roll, and directed to wait until a place can be found for him, and is paid for two months' services, and on the twenty-sixth day of the third month is notified that he will not be allowed for any more time, he is entitled to pay for all of his time prior to the reception of such notice. (*Louisville etc. R. R. Co. v. Offutt*, 467.)

4. EMPLOYER AND EMPLOYÉ—CONTRACT FOR FIXED TERM OF EMPLOYMENT, WHAT IS NOT.—A contract of a railway corporation to give one regular work as a freight conductor, and that such work shall continue so long as the employé faithfully and honestly works for his employer, is indefinite as to the time or term of employment, and is, therefore, subject to be terminated at any time at the discretion of either party. (*Louisville etc. R. R. Co. v. Offutt*, 467.)

5. MASTER AND SERVANT, VICE-PRINCIPAL, WHO IS.—Where a master delegates to one of his employés such authority as subjects the will and discretion of all other employés in and about a particular business to the direction and control of the person to whom that authority is delegated, he will be said to be a vice-principal, and to stand in the relation of the master himself. His negligence may, therefore, be imputed to the master. (*Taylor v. Georgia Marble Co.*, 238.)

6. MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE NOT.—If the plaintiff was employed in a factory, and the floor of the room in which he worked had to be taken up and replaced by a gang of workmen, he having no duty to perform in connection with them, he and they are not fellow-servants, and hence he may recover of their common master for injuries suffered from their negligence. (*Eingartner v. Illinois Steel Co.*, 859.)

7. CORPORATIONS, EMPLOYÉES OF ARE NOT ALL FELLOW-SERVANTS.—While, in a loose, general sense, all agents and servants of a corporation, without reference to rank or dignity, are common employés, they are not all fellow-servants in the sense

which relieves the corporation from liability for the negligence of one resulting in injury to another. (*Taylor v. Georgia Marble Co.*, 238.)

See Negligence, 4; Railroad Companies, 2, 5.

MAXIM.

THE MAXIM THAT IGNORANCE OF THE LAW excuses no one, is not so broad in its application that a mistake of law cannot be shown in evidence for the purpose of ascertaining the state of one's mind or one's motive. (*Schott v. Doah*, 531.)

MECHANIC'S LIEN.

1. MECHANICS' LIENS, WHAT CLAIMS MAY BE SECURED BY.—One who performs services in hauling lumber to premises, to be there used in the erection of a dwelling and other buildings, has a lien thereon under a statute providing that every mechanic or other person who shall do any work upon a building shall be entitled to a lien thereon. (*Kehoe v. Hansen*, 759.)

2. MECHANIC'S LIEN—FAILURE OF OWNER TO OBJECT TO WORK.—A wife is not precluded from contesting the validity of a lien claimed to exist for work done upon her property, at the request of her husband, by the fact that she knew of the work while it was being performed and did not object to it, when there is no statute creating a liability against her under such circumstances. (*Santa Cruz etc. Co. v. Lyons*, 174.)

3. CONSTITUTIONAL LAW—MECHANICS' LIENS.—A statute purporting to give a lien to any person who, at the request of the reputed owner of a lot, grades or otherwise improves a street, is unconstitutional. It is not within the power of the legislature to create a lien against the true owner of property by the acts of the reputed owner, there being nothing to estop him from disputing the acts or contract of the reputed owner. (*Santa Cruz etc. Co. v. Lyons*, 174.)

See Executors and Administrators, 7; Judicial Sales, 2.

MISTAKE.

See Homicide, 1.

MORTGAGE.

1. MORTGAGE, AFTER-ACQUIRED TITLE, WHEN NOT AFFECTED BY.—If the mortgagors own an undivided interest only, and they intend to give, and the mortgagee to receive, a mortgage restricted to that interest, but, by mistake, the mortgage describes an interest in severalty, title subsequently acquired by the mortgagors is not subject to the mortgage, though the code provides that, when a deed purports to convey a greater interest than the grantor was at the time possessed of, any subsequent interest inures to the benefit of the grantee. (*Cook v. Prindle*, 424.)

2. MORTGAGES—REDEMPTION FROM TAX SALE BY MORTGAGEE—LIEN FOR AMOUNT PAID.—A mortgagee who, to protect his security, redeems the mortgaged land from a sale for taxes has a right on foreclosure to charge the land with the repayment of the amount so paid, in addition to the amount due on the mortgage. (*Red Mountain Mining Co. v. Jefferson Co. Sav. Bk.*, 151.)

3. MORTGAGE, REVIVING AFTER BARRED BY THE STATUTE OF LIMITATIONS.—A mortgagor who has parted with the title to land cannot afterward revive the mortgage debt if it has become barred by the statute of limitations, so as to continue the lien of the mortgage as against one who purchased when the mortgage

appeared to be barred and without notice of the attempted revivor. (Cook v. Prindle, 424.)

4. STATUTE OF FRAUDS—PAROL AGREEMENT—CONSIDERATION.—A parol agreement between all of the parties that one of two mortgages on the same property shall have priority over the other is not within the statute of frauds, and is based upon sufficient consideration if a loan is obtained thereby. (Loewen v. Forsee, 489.) See Attorney and Client, 1; Corporations, 12; Fixtures; Husband and Wife, 5; Partnership, 2.

MUNICIPAL CORPORATIONS.

1. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—SPECIAL LEGISLATION.—If a statute providing for the annexation of cities, though general in its language, can in no event become operative upon but a single city by reason of conditions specified therein, it is special legislation, and void, under a constitution prohibiting the enactment of local or special laws for the incorporation of cities. (State v. Des Moines, 381.)

2. MUNICIPAL CORPORATIONS—RIGHT OF PRIVATE PERSON TO DISINCORPORATE—ESTOPPEL BY LACHES.—If a void statute annexes territory to a city, and by its terms disorganizes and abolishes municipal corporations lying within the annexed territory, and such city then exercises municipal jurisdiction over all of such territory for more than four years, levying and collecting taxes, making contracts and extensive improvements, and incurring liabilities, and is recognized as such enlarged corporation by subsequent sessions of the legislature, a nonresident taxpayer with but a trifling interest, who does not claim that he is injured by such enlarged corporation, nor that any benefit to anyone will be derived from his action, is not entitled, as a mere naked legal right, to a judgment avoiding and ousting the present corporate existence and authority of such city, although a statute allows such an action to be brought at any time within five years. In such case, the plaintiff is estopped by his laches from disturbing the city's equitable claim to jurisdiction over the annexed territory. (State v. Des Moines, 381.)

3. PUBLIC STREETS AND SQUARES, ESTOPPEL TO DENY EXISTENCE OF.—Cases may arise where private rights have grown up so as to be, in equity, paramount to the public rights, and where the prevention of injuries requires the assertion of the doctrine of equitable estoppel in pais for the protection of such private rights. If lands designated on a map or plat made by the owner as a public square are afterward by him inclosed and claimed as his private property, and are taxed to him for many years, during which he exercises the rights and performs the duties of a private owner of them without interruption and without any claim being made by the public, and they are further recognized as his property on a plat adopted by a statute incorporating the city, after which he sells and conveys them, the municipality and the public are estopped from claiming that they still constitute a public square. (Reuter v. Lawe, 892.)

4. MUNICIPAL CORPORATIONS, LIABILITY FOR NUISANCE—ORDINANCES.—A city is not liable for injuries to private persons resulting from a failure to enforce its police regulations which provide for the prevention and abatement of nuisances. (Butz v. Cavanaugh, 504.)

5. PUBLIC NUISANCE, AUTHORITY OF MUNICIPAL CORPORATION TO RESTRAIN BY SUIT.—If a building situate in a populous part of a city is so injured by fire as to endanger the property and lives of the inhabitants of the city, it may maintain a suit

in equity to compel the owner to tear down and remove such building. Its remedy is not limited to indictment or abatement. (*Huron v. Bank of Volga*, 769.)

6. MUNICIPAL INDEBTEDNESS, WHAT IS.—An agreement between a municipality and a partnership that the latter may construct a system of waterworks and issue bonds thereon for an amount specified, and that upon such construction to the satisfaction of the municipality, it will lease and operate such works, paying an annual rental for a period designated, at the end of which the works shall become the property of the municipality without any further payment or transfer, is but an indirect mode of creating an indebtedness against the municipality, and is void if the sums so agreed to be paid, added to the existing indebtedness, exceed the amount of liability which the city is permitted to incur. (*Harles v. Wells*, 886.)

7. MUNICIPAL INDEBTEDNESS, CONSTITUTIONAL PROHIBITIONS OF.—The moment an indebtedness is voluntarily created in any manner or for any purpose with no money or means in the treasury, nor current revenues collected, or in process of collection, for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limitation of indebtedness. (*Harles v. Wells*, 886.)

See Elections, 1, 2; Eminent Domain.

MURDER.

See Homicide.

NEGLIGENCE.

1. ONE WHO NEGLIGENTLY EXPOSES ANOTHER TO AN INFECTIOUS OR CONTAGIOUS DISEASE, which such other thereby contracts, is liable in damages therefor, in the absence of contributory negligence or the assumption of risk. (*Kliegel v. Atken*, 901.)

2. NEGLIGENCE—SUDDEN AND UNUSUAL PERIL.—There is no liability for an injury inflicted by one person upon another, even though the injured person is free from fault, if the cause of the injury is unusual, and one which reasonable and careful foresight could not have foreseen, and which, under the circumstances, such care and foresight could not have guarded against. Such injury, without want of ordinary care on the part of the person inflicting it, is an inevitable accident. (*Donahue v. Kelly*, 632.)

3. NEGLIGENCE—SUDDEN PERIL.—One who, in a sudden emergency, acts according to his best judgment, or who, by reason of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence. (*Donahue v. Kelly*, 632.)

4. NEGLIGENCE — SUDDEN EMERGENCY. — A restaurant keeper, whose servant grasps a burning lamp, and in attempting to carry it from the room is burnt, and then throws the lamp from him, when it explodes and injures a customer, is not liable in damages for such injury. (*Donahue v. Kelly*, 632.)

5. NEGLIGENCE—DEATH CAUSED BY—RIGHT OF ACTION.—A statute conferring the right to recover for a death caused by negligence does not confer such right upon nonresident aliens. (*Dent v. Penn. R. R. Co.*, 676.)

6. NEGLIGENCE—DEATH CAUSED BY—RIGHT TO MAINTAIN ACTION.—A nonresident alien mother is not included within the terms of a state statute simply giving to parents and others the

right to recover for the death of their child or children caused by negligence. (*Dani v. Penn. R. R. Co.*, 676.)

7. NEGLIGENCE—DEATH—RIGHT TO RECOVER — PROOF OF RELATIONSHIP.—To enable a mother to recover for the death of her adult son caused by negligence, the burden of proof is on her to show the existence in fact of a family relationship which entitles her to maintain such action. (*Dani v. Penn. R. R. Co.*, 676.)

8. NEGLIGENCE — PROXIMATE CAUSE — TRESPASS. — If one voluntarily goes into an excavation on private property near a street and is injured thereby, the fact that the street is in a dangerous condition at that place is not the proximate cause of the injury. (*Butz v. Cavanaugh*, 504.)

9. NEGLIGENCE—GASOLINE — CONSTRUCTION OF STATUTE.—One who keeps gasoline on his premises for illuminating purposes only, and not for sale, is not guilty of negligence in thus keeping it, under a statute which prohibits the keeping of gasoline for sale unless it is of a certain fire test. The statute has no application to such case. (*Donahue v. Kelly*, 632.)

See Animals, 4. 6; Carriers, 1, 3; Railroad Companies, 8, 13.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTE, EFFECT OF UPON ORIGINAL OBLIGATION.—A note given by a debtor for a pre-existing debt suspends the right of action upon the original consideration until the note becomes due, but if it remains unpaid after that time, the creditor may elect to sue upon the original indebtedness, unless the note was accepted as payment thereof. (*Otto v. Halff*, 56.)

2. NEGOTIABLE INSTRUMENTS ASSIGNED AFTER MATURITY, though for a valuable consideration, are subject to all equities existing between the original parties. (*Loewen v. Forsee*, 489.)

3. NEGOTIABLE INSTRUMENTS — ASSIGNMENT—NOTION OF EQUITIES.—An assignee of purchase money mortgage notes, who takes them with notice of an agreement between the mortgagor, the purchase money mortgagee, and a second mortgagee that the mortgage of the latter shall have priority, takes subject to such agreement, although the assignment was made before maturity of the notes and for value and the purchase money mortgage was first recorded. (*Loewen v. Forsee*, 489.)

4. NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY —EQUITIES.—A negotiable note transferred before maturity as collateral security for a pre-existing debt, without any agreement extending the time of payment of such debt, is subject to all equities existing between the original parties to it. (*Loewen v. Forsee*, 489.)

5. NEGOTIABLE INSTRUMENTS — COLLATERAL SECURITIES—EQUITIES.—If a negotiable note is transferred merely as collateral security for a pre-existing debt, and no new consideration is given for it, the assignee takes it subject to all equities existing between the parties to it. (*Loewen v. Forsee*, 489.)

See Alteration of Instruments; Corporations, 1; Husband and Wife, 8; Interest; Usury, 1.

NONSUIT.

See Trial, 6, 7.

NOTARIES PUBLIC.

NOTARY PUBLIC—ATTORNEY OF INTERESTED PARTY.—The attorney at law of a mortgagee is not incompetent as a

notary public to attest the execution of the mortgage. (*Jones v. Howard*, 231.)

See Deeds, 2.

NOTICE.

NOTICE OF UNLAWFUL PURPOSE, FROM WHAT PRESUMED.—Knowledge on the part of a lender of moneys to a mercantile corporation that they were to be used for the purchase of stock in itself is sufficient to charge him with notice that such an act must work a fraud upon creditors, and is therefore against public policy, and prohibited by law. Neither by the giving of promissory notes for such moneys, nor by confession of judgments thereon can the corporation create any liability capable of enforcement to the prejudice of its creditors. (*Adams etc. Co. v. Deyette*, 751.)

See Agency, 6-8; 10; Judicial Sales, 1.

NUISANCE.

See Injunction; Municipal Corporations, 4, 5; Real Property, 2, 3.

OFFICERS.

1. OFFICERS—ELIGIBILITY OF WOMEN TO OFFICE—STATUTORY CONSTRUCTION.—The word "his," as used in a statute or state constitution as referring to the qualifications of officers, includes females as well as males, unless a contrary intent appears by the context or otherwise. (*State v. Hostetter*, 515.)

2. OFFICERS—ELIGIBILITY OF WOMEN TO OFFICE.—A clerk of a county court is a ministerial officer, and as the constitution and statutes of Missouri only require that such office shall be filled by a citizen of the United States and of the state, without requiring that it shall be filled by a male citizen, a woman is not disqualified by reason of her sex alone from holding such office as she may possess the citizenship required. (*State v. Hostetter*, 515.)

3. SURETYSHIP—LIABILITY ON BOND OF CITY SUPERINTENDENT OF WATER WORKS.—Ordinarily the duties of a superintendent of city water works do not include the collection of moneys, nor do they constitute him the financial agent for the settlement of accounts and the handling of the revenues of the city; and the sureties on his bond are not liable for his default in failing to account for water rents collected by him in the absence of any condition in the bond, or ordinance authorizing him to collect such rents. (*Salem v. McClintock*, 830.)

ORDER OF PROOF.

See Appeal, 8; Trial, 1;

PARTNERSHIP.

1. THE REAL ESTATE OF A PARTNERSHIP is subject to the same rules as its personal property. (*Brady v. Kreuger*, 771.)

2. PARTNERSHIP—MORTGAGE—EVIDENCE.—The fact that one partner gave a mortgage to his copartner does not prevent the former from showing that such transaction was but part of an agreed plan to put the ostensible title in himself, while the mortgagee was to become an entirely dormant partner. (*Short v. Taylor*, 508.)

3. PARTNERSHIP, EFFECT OF THE RETIRING OF ONE MEMBER WITH AN AGREEMENT THAT THE OTHERS WILL ASSUME THE LIABILITIES.—An agreement between partners that one of them shall retire from the firm, and that those remaining will assume and discharge the firm liabilities, unless consented

to by its creditors, does not release the retiring partner from liability, nor change his liability into that of a surety. (Shapleigh Hardware Co. v. Wells, 783.)

4. PARTNERSHIP—ACCOUNTING—PLEADING.—In an action for an accounting between partners, an allegation of partnership is not admitted by a failure to deny it under oath. (Short v. Taylor, 508.)

See Attachment, 2; Creditor's Suit; Homestead, 4; Judgment, 8.

PLACE OF CONTRACT.

See Insurance, 5.

PLEADING.

1. IN CODE PLEADING, THE ULTIMATE, and not the probative, facts must be alleged, and a complaint merely stating the evidence from which the ultimate facts are deducible is insufficient when assailed by demurrer. (McCaughey v. Schuette, 176.)

2. PRACTICE—JOINDER OF CAUSES OF ACTION.—Under a statute permitting plaintiffs to unite several causes of action when all arise out of the same transaction, or transactions connected with the same subject matter, a complaint against a banking corporation and a building and loan association alleging the payment of a sum of money to the bank out of which it undertook to pay the association the amount due it as soon as such amount was ascertained, but that, without waiting for such ascertainment, it paid the association a much greater sum, states causes of action arising out of the same transaction, and therefore is not subject to demurrer for misjoinder of causes of action. (Pollock v. Building etc. Assn., 695.)

3. PRACTICE—WAIVER OF IRREGULARITIES.—If an amended petition is filed and a motion made for the appointment of a receiver, and the defendant answers the petition and resists the motion, he waives his right to afterward complain of any irregularity in the filing of the petition or the making of the motion. (Miller v. Cavanaugh, 463.)

4. PRACTICE—PLEADING—DEMURRER.—A paragraph of an answer pleaded in bar of the entire action is subject to demurrer if it does not answer the entire complaint. (State v. Tomlinson, 335.)

5. PRACTICE.—TO SUSTAIN A DEMURRER FOR WANT OF JURISDICTION, the complaint must affirmatively show that some fact essential to jurisdiction does not exist. If residence of the plaintiff within the state is necessary, it will be presumed until the contrary is alleged. (Pollock v. Building etc. Assn., 695.)

6. PLEADINGS — DEFENSES — OBJECTION TO, HOW RAISED.—If a plea contains good matter of defense and also immaterial matter, the defect cannot be reached by demurrer to the whole plea, but objection should be raised by motion to strike out the immaterial matter. (Ansley v. Bank of Piedmont, 122.)

7. PLEADINGS—MISJOINDER OF DEFENSES.—If a plea sets up a setoff or a right to recover damages by way of recoupment a claim arising ex contractu cannot be united in the same plea with a claim arising out of a tort. (Ansley v. Bank of Piedmont, 122.)

8. PLEADING.—DEFENDANT, BY SEPARATE PLEAS, may make as many defenses as he sees proper, whether repugnant to and inconsistent with one another or not, but a defense made by single plea must be consistent with itself. (Ansley v. Bank of Piedmont, 122.)

9. PLEADING—INCONSISTENT PLEAS—FRAUD — SETOFF. Facts which show fraud averred in a plea in bar to the action be-

cause of fraud cannot be made the basis in the same plea to support a claim of setoff or recoupment. (Ansley v. Bank of Piedmont, 122.) See Appeal, 1; Ejectment; Insurance, 8; Judgment, 11; Partnership, 4; Real Property, 5.

POSSESSION OF STOLEN GOODS.

See Burglary.

POWERS.

A POWER CANNOT BE VALID if the purpose for which it is created is not legal. Hence, if contained in a trust deed made to secure a loan, infected with usury, it cannot authorize a sale in pursuance of the terms of such deed. (Pottle v. Iowa, 246.)

See Judgment, 8.

PREFERENCE OF CREDITORS.

See Corporations, 11-15.

PRESUMPTIONS.

See Corporations, 26; Evidence; Insurance, 18, 36; Justice of the Peace, 2; Notice; Waters and Watercourses, 2.

PROCESS.

1. JURISDICTION OF TRANSIENT PERSONS—NONRESIDENTS.—If one who is a permanent resident of a state goes to another and there conducts a business, he may be a transient person within the meaning of the laws of the latter state applicable to such persons, against whom summons may be served by publication. (Hambel v. Davis, 46.)

2. SUMMONS OR CITATION.—SUFFICIENCY OF DESCRIPTION OF OFFICER AND OF PLACE TO APPEAR.—A citation directed to the sheriff or any constable of C. county, which is ordered to be published in a designated newspaper in that county and commands the defendant "to appear at my office in the town of L.," and which is signed "E. H. Rogan, J. P. C. Co.," is sufficient. From it the defendant must know that he is required to appear at the office of the above-named justice of the peace in the town of C. (Hambel v. Davis, 46.)

See Corporations, 22-24.

PROVOCATION.

See Homicide, 5, 6.

PROXIMATE CAUSE.

See Negligence, 8.

PUNCTUATION.

See Contracts, 4.

RAILROAD COMPANIES.

1. RAILWAYS, CARE REQUIRED OF.—In carrying passengers, railroads are held to the highest degree of care, diligence, and skill consistent with such mode or means of transportation under the circumstances. (McKeon v. Chicago etc. Ry. Co., 210.)

2. MASTER AND SERVANT, VICE-PRINCIPAL—RAILWAY CORPORATIONS.—If an engineer in the employ of a railway corporation has the sole charge, control, and management of a train and the brakemen thereon, so that the latter are under the duty of

obeying his orders, they are not fellow-servants. The engineer is a vice-principal, and a brakeman may recover of the corporation for injuries resulting to him from the negligence of such engineer in running cars together which the brakeman was attempting to couple and without waiting for the usual signal from the brakeman. (Taylor v. Georgia Marble Co., 238.)

3. PRINCIPAL AND AGENT, RATIFICATION OF MALICIOUS ACT.—If a railway corporation retains a conductor in its employ after knowledge of a willful and malicious tort on his part, this is evidence of its ratification of such tort, but whether it was ratified or not is a question for the jury. (Robinson v. Superior etc. Ry Co., 897.)

4. RAILWAY CORPORATIONS, LIABILITY OF FOR MISTAKE IN TICKET.—If a person applies for a first-class passenger ticket, and by mistake of the agent is given a limited ticket, in consequence of which he is ejected by the conductor from the train, the railway corporation is liable in an action of tort for the injuries sustained by such ejecting. (Louisville etc. R. R. Co. v. Gaines, 465.)

5. RAILROADS—LIABILITY FOR ACT OF EMPLOYEE.—A railroad company is liable for an injury received by a passenger in jumping from a moving train, when such act is induced by the terrifying acts and exclamations of a brakeman made in the car in which such passenger is traveling, and from which the latter might reasonably infer that a wreck of the train or great danger was imminent, although such brakeman had no express duty to perform in or about the car or in directing the passengers. (Ephland v. Missouri Pac. Ry. Co., 498.)

6. SLEEPING-CARS, CARE IN AWAKENING PASSENGERS. If the porter of a sleeping-car does not awaken a passenger at her station for leaving the train, nor attempt to do so, nor have any good reason for thinking he has done so, he has not used sufficient care and diligence, and his employer is liable for the resulting injuries to a passenger thus neglected. (McKeon v. Chicago etc. Ry. Co., 910.)

7. RAILWAY SLEEPING-CARS, DUTY TO AWAKEN PASSENGERS.—If a female passenger has a sleeping-car ticket to a station designated, it is the duty of the railway to awaken her in time to make the necessary preparations to leave the car in a suitable and decent manner upon reaching the station, or, failing to do so, to hold the train a sufficient length of time to enable her to make such preparations as are necessary to leave the car without the exposure of her person to the gaze of spectators. (McKeon v. Chicago etc. Ry. Co., 910.)

8. RAILROADS—KILLING OF STOCK—OWNER'S CONTRIBUTORY NEGLIGENCE.—Every man is bound, at his peril, to keep his stock on his own close, and to prevent them from going onto that of his neighbor. Hence, if one allows his horses to break out of their pasture lot and to stray upon a railroad track, where they are killed by a locomotive, the owner's contributory negligence will bar a recovery for their loss, even if they were killed through the negligence of the company's servants. (Case v. Central R. R. Co., 617.)

9. RES GESTAE in a suit for ejecting plaintiff from a railway car under the claim that he had not paid his fare include all the conversation between himself and the conductor about the fare at the time of, and immediately after, the ejecting, and also what the conductor said immediately after allowing the plaintiff to return and resume his seat in the car. (Robinson v. Superior etc. Ry. Co., 897.)

10. DAMAGES FOR HUMILIATION AND SHAME.—A request to instruct a jury not to allow anything for feelings of humiliation and shame unless they contributed to plaintiff's bodily injury is prop-

erly refused, in an action by a married woman for not awakening her in time to enable her to dress before reaching the station where she must change cars, and then hustling her out of the sleeping-car half clad and exposing her in this condition to the gaze of spectators, and otherwise injuring her, whereby she suffered a miscarriage. (McKeon v. Chicago etc. Ry. Co., 910.)

11. JURY TRIAL.—A VERDICT CANNOT BE REGARDED AS SO EXCESSIVE AS TO CREATE A BELIEF that the jury were misled by passion, prejudice, or ignorance, where it awards two thousand five hundred dollars damages to the plaintiff, a married woman, for not being awakened in time to dress before leaving a sleeping-car, and then being hustled unclad into another car, and thereby exposed, in that condition, to the gaze of spectators, and otherwise injured, from which she suffered a miscarriage. (McKeon v. Chicago etc. Ry. Co., 910.)

12. CRIMINAL STATUTE, WHEN VOID FOR UNCERTAINTY, A statute declaring that any railway corporation which shall charge, collect, or receive more than a just or reasonable rate of toll or compensation for the transportation of passengers and freight or the use of any railway car shall be guilty of extortion, is void for uncertainty, because it furnishes no test by which to determine what charges for its services are just or reasonable, as it cannot be known therefrom, when a charge is made, whether it is lawful or not, nor can this be ascertained except by the verdict of a jury. (Louisville etc. R. R. Co. v. Commonwealth, 457.)

13. STATUTE OF LIMITATIONS—FRAUDULENT CONCEALMENT OF NEGLIGENCE.—If a man is known to have been killed while in the employ of a railway corporation as a section hand, from the jumping from the track of a car in which he was riding, the fact that the corporation insisted that the killing was an accident for which it was not blamable, and that its car was in a good and safe condition, and that none of its employes were guilty of negligence, is not such a fraudulent concealment of a cause of action as prevents the running of the statute of limitations, and entitles the administrator of the decedent to maintain an action within two years from discovering that the injury to the decedent was the result of the negligence of the defendant or its agents. (McBride v. Burlington etc. Ry. Co., 895.)

See Actions, 1, 2, 7; Eminent Domain; Mandamus, 4; Real Property, 4.

RAPE.

1. RAPE.—WHETHER A WOMAN POSSESSES MENTAL CAPACITY SUFFICIENT to give consent must, saving in exceptional cases, be a question of fact for the jury. (People v. Griffin, 216.)

2. RAPE.—WANT OF KNOWLEDGE THAT THE FEMALE IS IN LAW DEEMED INCAPABLE OF CONSENT either because she is not of the age of consent, or does not possess the mental capacity requisite to give it, is not a defense to a prosecution for rape. A man seeking illicit intercourse with a woman must ascertain at his peril whether she has the age and mental capacity required to make her consent a protection to him. (People v. Griffin, 216.)

3. EVIDENCE OF MENTAL INCAPACITY.—Upon a prosecution for rape, where it is claimed that the female did not have mental capacity to consent, evidence is properly admitted to show that she had been feeble-minded since early childhood, and that she was at the time of the trial, some six months after the alleged offense, an inmate of an institution for the feeble-minded. (People v. Griffin, 216.)

RATIFICATION.

See Contracts, 11, 12; Forgery; Railroad Companies, 8.

REAL PROPERTY.

1. **REAL ESTATE, WATER, WHEN A PART OF.**—Subterraneous water not flowing in a definite course or channel, but percolating and seeping through the earth, is a part of the realty. It belongs to the owner of the land as much as the rocks or stones in it. (Metcalf v. Nelson, 746.)

2. **NUISANCE—DANGEROUS PREMISES.**—A landowner in a city who fails to fill, or fence, or inclose by a wall, a dangerous excavation on his premises adjoining the street as required by ordinance, is liable for injuries resulting to a stranger therefrom. (Butz v. Cavanaugh, 504.)

3. **NUISANCE—DANGEROUS PREMISES—TRESPASSER.**—A landowner in a city who fails to fill or inclose a dangerous excavation on his premises, as required by an ordinance, is not liable in damages for an injury to an intelligent boy twelve years of age, who, contrary to the warning of his father, becomes a trespasser by voluntarily going into such excavation. (Butz v. Cavanaugh, 504.)

4. **HIGHWAYS—DANGEROUS EXCAVATIONS—PROXIMITY—LIABILITY FOR INJURIES.**—One who digs an excavation near a highway, and leaves it unguarded, is not answerable in damages to a person who departs from the highway and is injured by falling into such excavation, unless it is so near the highway as to endanger those who use the way with reasonable care. Hence, if one, ignorant of the locality, wanders in the dark at night, from a public highway, over an unused strip of land, fifteen feet in width, belonging to a third person, into the land of a railroad company, and, after crossing five feet of it, falls, with his horse and buggy, into an unguarded railroad cut, made before the construction of the highway, and is injured, the railroad company is not liable therefor, as the cut, in such a case, does not substantially adjoin the highway, and is not dangerous to those who use it with care, where all the land crossed is a foot or more above the crown of the highway, and constitutes a barrier sufficient to excite caution after departing from the highway. (Daneck v. Penn. R. R. Co., 613.)

5. **PLEADING.—IN AN ACTION TO RECOVER POSSESSION OF REAL PROPERTY,** a complaint which states that the defendant mortgaged such property to plaintiff, and then agreed to convey it to him in satisfaction of the mortgage debt, that such conveyance was thereupon made, and that the defendants are in possession of the property and have refused, after a demand, to deliver it up to the plaintiff, is fatally defective, because it sets up mere matters of evidence, and does not contain any statement of seisin, or ownership, or right of possession on the part of the plaintiff. (McCaughy v. Schuette, 176.)

RECEIVERS.

RECEIVER, APPLICATION FOR, WHEN PLACES PROPERTY IN THE CUSTODY OF THE LAW.—If a bill is filed having for its object the appointment of a receiver to take into custody the property of the defendant and to pay and discharge all his liabilities therefrom, the jurisdiction of the court at once attaches to such property, so that no interference with it on the part of other courts will be allowed. (Reisner v. Gulf etc. Ry. Co., 84.)

See Attachment, 3; Banks and Banking, 2; Corporations, 24.

REFERENCE.

See Appeal, 6.

REINSTATEMENT.

See Insurance, 23, 24.

RELIGIOUS SOCIETIES.

1. RELIGIOUS ASSOCIATIONS — PROPERTY OF — DIVERSION.—Property given or set apart to a church or religious association for its use in the enjoyment and promulgation of its adopted faith and teachings is by such association held in trust for that purpose, and any members of such association less than the whole have no power to divert it therefrom. (Park v. Chaplin, 353.)

2. RELIGIOUS ASSOCIATIONS—POWER TO DIVERT PROPERTY OF.—A church or religious association incorporated as a certain branch of a particular creed or denomination, cannot, without the consent of all of its members, transfer its property acquired for its benefit as such corporation to another branch of the same denomination or creed holding different doctrines and beliefs. (Park v. Chaplin, 353.)

3. RELIGIOUS ASSOCIATIONS—PROPERTY RIGHTS—RIGHT TO DIVERT.—Although a church or religious association incorporated as a branch of a certain denomination has become a member of a higher body of the same denomination with power only in ecclesiastical matters, the rules of which provide that a church in good standing as a member shall, on request for dismissal to another denomination or branch of the same denomination, receive a letter of recommendation, this does not confer upon the first-named church association power to transfer without the consent of all its members to another denomination, nor to a branch of the same denomination, property acquired for its use as originally incorporated. (Park v. Chaplin, 353.)

REMEDIES.

See Actions, 2, 10.

REPLEVIN.

See License, 3.

RESCISSION.

See Contracts, 13, 14; Insurance, 25-28; Sales, 1, 2, 4; Vendor and Purchaser, 2

RES GESTAE.

See Evidence.

RES JUDICATA.

See Judgment.

SALES.

1. SALES—RIGHT TO RESCIND.—If the purchaser of goods pays the freight charges thereon, and they are delivered to him as directed by the seller, upon his acceptance of a draft drawn upon him by such seller, the latter cannot rescind the sale and recover the goods without returning or tendering the accepted draft to the purchaser, and he is not released from this obligation by the insolvency of the purchaser. (Wilcox v. San Jose etc. Co., 135.)

2. SALES—CONTRACT FOR—RESCISSION.—To entitle a vendor to rescind a sale of goods and recover them from the purchaser, he must first restore the latter to the same condition and advantage, so far as can be reasonably done, as he occupied before the purchase, and his insolvency does not excuse this duty on the part of the vendor. (Wilcox v. San Jose etc. Co., 135.)

3. AN ELECTION TO RESCIND A SALE FOR FRAUD HAVING BEEN MADE BY SUING TO RECOVER POSSESSION of the property, the vendor cannot afterward exercise or claim the right of stoppage in transitu. The exercise of the right of stoppage in transitu does not operate to rescind a sale. But the vendee still has the right to take the goods on payment of the purchase price. (Kearney etc. Co. v. Union Pac. Ry. Co., 434.)

4. RESCINDING SALE FOR FRAUDULENT PURPOSE OF VENDEE NOT TO PAY.—If goods are sold on credit, and the vendee has a secret intention not to pay for them, the vendor, on discovering that intention, has the right to rescind the sale, though the goods have passed into the possession of the purchaser. (Kearney etc. Co. v. Union Pac. Ry. Co., 434.)

5. WARRANTY, WAIVER OF WRITTEN NOTICE OF.—If a purchaser, claiming that a machine does not conform to a warranty thereof, returns it to the agent of whom he purchased, and demands a return of notes given therefor, which the agent agrees to make, this is a waiver of the written notice of a breach of warranty, if the agent has authority to make such a waiver. (Peterson v. Wood Mowing etc. Co., 899.)

6. SALES—FRAUD—RETURN ON ATTACHMENT AS EVIDENCE.—If, in an action to recover attached property under a claim of purchase before attachment, the attachment is defended on the ground that the purchase was fraudulent and the jury so finds, it is harmless error to admit in evidence the return on attachment tending to show that the attachment levy was defective, as, under the finding, the plaintiff is not entitled to the property, and his rights cannot be made to depend on whether the levy was valid or not. (Klotz v. James, 348.)

SCHOOLS.

1. SCHOOLS—VACCINATION OF CHILDREN—REQUIREMENT AS TO.—There is no law of the state of Illinois requiring vaccination as a condition precedent to the exercise of the legal right of every child in that state, of proper age, to attend public schools. (Potts v. Breen, 262.)

2. SCHOOLS—VACCINATION OF CHILDREN.—THE POWER TO COMPEL the vaccination of children as a prerequisite to the exercise of their right to attend public schools can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. (Potts v. Breen, 262.)

SCHOOLS.

See Boards of Health, 5, 6.

SETOFF.

1. SETOFF—PLEA OF ADMITS VALIDITY OF CONTRACT.—A defendant who pleads a setoff and recoupment thereby admits the validity of the contract sued on. (Ansley v. Bank of Piedmont, 122.)

2. SETOFF.—PLEAS WHICH SET UP A BREACH OF CONTRACT in support of a claim of recoupment or setoff must be as distinct and unambiguous as if suing directly for the breach of the contract. (Ansley v. Bank of Piedmont, 122.)

3. SETOFF.—BREACH OF PROMISE CONTRACTUAL IN ITS NATURE to support a claim of recoupment or setoff, must be one capable of enforcement, and, if void under the statute of frauds, or the damages for its breach are too speculative or remote to be capable of ascertainment with reasonable certainty, they are not recov-

erable by way of recoupment or setoff. (*Ansley v. Bank of Piedmont*, 122.)

4. COUNTERCLAIM, CONSTRUCTION OF STATUTES RESPECTING.—Statutes giving defendants a right to assert counterclaims should be liberally construed. (*McHard v. Williams*, 766.)

5. COUNTERCLAIM, WHEN ARISES OUT OF THE SAME TRANSACTION, OR IS CONNECTED WITH THE SUBJECT OF THE ACTION.—Under a statute providing that the defendant may plead any counterclaim arising out of the cause of action set forth in the plaintiff's complaint, or connected with the subject of the action, a defendant, sued to foreclose a mortgage on real property, may plead that at the time the note sued upon was given, and as part of that transaction, he executed to the plaintiff a chattel mortgage to secure the same note, that the plaintiff afterward without the consent of the defendant, altered such mortgage in a material respect, and, subsequently pretending to foreclose it, the plaintiff unlawfully took and carried away certain personal property described therein, and converted it to his own use to the damage of the defendant in a sum specified. (*McHard v. Williams*, 766.)

6. SETOFF—DAMAGES WHEN REMOTE.—In an action on a note given for the purchase price of land, damages to the vendee arising from the failure of the vendor to secure the location of valuable improvements in the town in which such land is situated, and which it was represented would be there located, are too speculative and remote to form the basis of a plea in setoff or recoupment. (*Ansley v. Bank of Piedmont*, 122.)

See Pleading, 7, 9.

SHIPPING.

1. SHIPPING—MARITIME LIENS—FEDERAL JURISDICTION.—If a maritime lien exists by reason of maritime law, as distinguished from a contract lien or lien given by state statute, the federal courts have exclusive jurisdiction, and no contract of the parties nor state statute declaring a lien in such cases and providing a remedy can oust the federal courts of their exclusive jurisdiction. (*Scatcherd Lumber Co. v. Rike*, 147.)

2. SHIPPING—MARITIME LIENS—STATE JURISDICTION.—In all cases where the federal courts have not exclusive jurisdiction, it is competent for the states to legislate relative to shipping contracts and torts, create liens upon vessels, boats, and instruments of water conveyance, even upon navigable rivers, and provide for the enforcement of such liens. (*Scatcherd Lumber Co. v. Rike*, 147.)

3. SHIPPING—MARITIME LIENS—RIGHT OF STATE TO CREATE.—A state statute creating a lien for materials and supplies furnished and work and labor performed in the original construction of a vessel or boat, or for repairs made upon it while in the home port, and providing for the enforcement of such lien, is valid and constitutional, for the reason that in such cases no maritime lien exists over which the federal courts have exclusive jurisdiction. (*Scatcherd Lumber Co. v. Rike*, 147.)

4. SHIPPING—MARITIME LIENS—BILL TO ENFORCE JURISDICTION.—The home port of a vessel is where the owner resides, and a bill filed in a state court to enforce a lien given by statute for work done and material furnished in repairing a vessel while in the home port, which alleges that such work was done and material furnished in repairing the vessel while in the home port, but also alleges that the owners are nonresidents, and the evidence shows that the vessel plies on waters within the state, is insufficient to confer jurisdiction upon the state court. (*Scatcherd Lumber Co. v. Rike*, 147.)

SLANDER.

EVIDENCE—RES GESTAE.—In an action for slander in charging a married woman with adultery with a certain person, after a witness has testified that some time before the time of the alleged slander he met the plaintiff and her husband, that plaintiff was crying, and upon being asked by the witness what was the matter, she replied that her husband could tell him, further testimony by such witness that he and plaintiff's husband soon thereafter started away, and that, in the absence of the plaintiff, her husband then stated to the witness that his wife had confessed to having been guilty of adultery with such named person, is not admissible as part of the *res gestae*. (*Robertson v. Hamilton*, 819.)

SPECIAL VERDICT.

See Trial, 10.

SPRINGS OF WATER.

See Waters and Watercourses.

STATUTE OF FRAUDS.

See Agency, 4; Contracts, 16; Corporations, 9; Mortgage, 4; Vendor and Purchaser, 7-10.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. **STATUTES—CONSTRUCTION.**—In determining the meaning of an existing statute, the prior law and all changes therein should be considered. (*State v. Hostetter*, 515.)

2. **STATUTES, REPEAL OF BY IMPLICATION.**—A statute authorizing the service of process by publication in actions before justices of the peace is not repealed by a subsequent statute authorizing the governor to select and designate an official paper in which, within any given district, publication may be made. (*Hambel v. Davis*, 46.)

3. **CONSTITUTIONAL LAW—REDEMPTION, STATUTES PURPORTING TO AFFECT.**—After a sale has been made under execution, the rights of the purchaser and the judgment debtor are fixed as by contract, and the legislature cannot subsequently authorize a redemption after a longer time, or for a less sum, than was required by the law in force when the sale was made. (*Thresher v. Atchison*, 159.)

See Banks and Banking, 3; Boards of Health, 1-4; Criminal Law, 1; Execution, 3; Executors and Administrators, 1; Game Laws; Husband and Wife, 1, 3, 5; Mandamus, 4; Mechanic's Lien, 1, 3; Municipal Corporations, 1; Negligence, 5, 6, 9; Officers, 1, 2; Railroad Companies, 12; Setoff, 4; Shipping, 3; Suretyship, 10; Trusts, 1-3.

STOPPAGE IN TRANSITU.

See Sales, 3.

SUBMISSION OF CAUSES.

PRACTICE—SUBMISSION ON AGREED FACTS—SUBSEQUENT EVIDENCE.—If a case is submitted on agreed facts, the court has no power, without first setting aside such submission, to permit one party, over the objection of the other, to introduce additional facts in evidence, the existence of which was well known prior to such submission. (*Wilcox v. San Jose etc. Co.*, 185.)

SUNDAY.

1. **SUNDAY.—MINISTERIAL ACTS MAY BE PERFORMED** on Sunday, but judicial acts may not. An application for a writ of error may be received and filed on Sunday. (*Hanover Fire Ins. Co. v. Shrader*, 25.)

2. **SUNDAY CANNOT BE EXCLUDED FROM A COMPUTATION OF TIME** within which an act may be done, where such time is not short. Hence, if parties are allowed thirty days after the filing of a decision in which to apply for a writ of error, the falling of the last of these days on Sunday does not entitle them to make such application on the following Monday. (*Hanover Fire Ins. Co. v. Shrader*, 25.)

SURETYSHIP.

1. **SURETYSHIP.—SURETIES ARE NOT BOUND** beyond the strict terms of their engagement, and their liability cannot be extended by implication. (*Salem v. McClintock*, 330.)

2. **SURETYSHIP—NONOFFICIAL BONDS.**—If duties are imposed upon a principal in a nonofficial bond, which are not commonly attached to the position which he is filling, and no mention of such unusual and different duties is made in the conditions of such bond, the sureties thereon can only be held for the default of the principal in the performance of such duties as are plainly and commonly understood to belong to the class of employment by which the principal is designated. (*Salem v. McClintock*, 330.)

3. **SURETIES.—ON THE DEATH OF THE PRINCIPAL DEBTOR**, the payee may look to the sureties as primarily liable to perform the contract, and need not present the claim to the administrator of the deceased principal for allowance and payment. Though the claim is presented to, and rejected by, the administrator, and the right to maintain an action thereon is lost by failure to commence it within the time allowed by statute, the right to recover of the surety is not thereby affected. (*Willis v. Chowning*, 842.)

4. **SURETY, PRINCIPAL DEBTORS CANNOT CHANGE ONE OF THEIR NUMBER INTO.**—One of two or more principal debtors cannot, by agreement among themselves, without the consent of their creditor, be changed in character from a principal to a surety, so that he will be released by those acts or omissions which release a surety. (*Shapleigh Hardware Co. v. Wells*, 783.)

5. **SURETY ON DELIVERY BOND, RELEASE OF BY DELIVERY OF PROPERTY.**—Where a surety on a delivery bond has delivered the property as called for by the bond, and it has been sold and applied to the satisfaction of the judgment, the judgment creditor cannot avoid the effect of such delivery or of a release granted to the surety because thereof by proving that the principal in the bond did not consent to the delivery. (*Willis v. Chowning*, 842.)

6. **SURETYSHIP—DISCHARGE.—TAKING NOTES** payable at a future day for an existing debt does not of itself imply an agreement to wait until the notes mature, nor discharge the parties secondarily liable for the payment of the debt as sureties or guarantors. (*Phoenix Brewing Co. v. Rumbarger*, 647.)

7. **SURETYSHIP—WHAT RELEASES FROM LIABILITY.**—Any act of the creditor which prevents the surety from insisting on the fulfillment of the contract as originally made, or which entitles the principal debtor to delay, is a ground of defense in an action against the surety, but, to exonerate the surety, it must appear that the original obligation was changed by a binding agreement, and the new contract must be such as would be a valid defense by the principal debtor to an action on the original agreement. (*Phoenix Brewing Co. v. Rumbarger*, 647.)

8. SURETYSHIP—WHAT DOES NOT EXONERATE SURETY. If a bond with sureties is given to secure the payment of the amount of sales to be made in future by the creditor for an indefinite period of time in a continuing business, and, after payments on account from time to time, but without any agreement as to the balance due, the principal debtor, of his own motion, gives the creditor a judgment note at six months for the amount appearing from his books to be due, the receipt of which is not acknowledged nor credited on the creditor's books, who, after a demand that the whole account be paid, extends credit for three months at the request of the debtor until the note is due, and then enters judgment thereon and issues execution, there is no such satisfaction of the original debt, or a giving of time to the principal debtor, as varies the original contract, or exonerates the sureties on the bond from liability. (Phoenix Brewing Co. v. Rumbarger, 647.)

9. SURETIES—STATUTE OF LIMITATIONS.—THOUGH A DEBT IS BARRED AGAINST THE PRINCIPAL, judgment may be entered against a surety if he remains liable thereon, and if he pays the debt, a cause of action thereupon accrues in his favor against the principal, though the latter, because of the statute of limitations, was not, at the time of such payment, subject to an action in favor of the original payee. (Willis v. Chowning, 842.)

10. SURETYSHIP—CONSTRUCTION OF STATUTE.—The failure of a creditor to brand barrels or casks in which liquors are sold, as commanded by a statute providing a penalty for failure to do so, but not prohibiting the prosecution of business when its provisions are not complied with, is no defense to sureties on a bond given to secure the payment of the purchase price of such liquors. (Phoenix Brewing Co. v. Rumbarger, 647.)

See Appeal, 20; Attorney and Client, 2; Husband and Wife, 8; Officers, 3.

TRESPASS.

DAMAGES, ACTS OF TRESPASSER IN MITIGATION OF. If a trespasser cuts standing timber which another had a license from the owner to cut and remove, and the latter sues the trespasser in replevin therefor, he thereby ratifies the act of such trespasser in severing the timber, and must allow him the reasonable cost and such enhancement in value as has resulted from his labor and expenditures. (Keystone Lumber Co. v. Kolman, 905.)

TRIAL.

1. PRACTICE—EVIDENCE.—THE ORDER OF INTRODUCING EVIDENCE is so largely within the discretion of the trial court that its rulings will not be interfered with, unless they clearly establish an abuse of its discretion. (Peterson v. Wood Mowing etc. Co., 39.)

2. MURDER—CROSS-EXAMINATION OF THE ACCUSED.—If the accused in a murder trial has testified in his own behalf, he may be recalled for cross-examination during the time that rebuttal evidence for the prosecution is being offered. (Commonwealth v. Eisenhower, 670.)

3. JURY TRIAL.—ALL QUESTIONS AS TO THE CREDIBILITY OF THE WITNESSES and the weight and effect of their testimony is for the jury, and a court properly refuses an instruction designed to cast doubt upon the testimony of any particular witness. (McKeon v. Chicago etc. Ry. Co., 910.)

4. JURIES.—JURORS WHO HAVE BEEN "STOOD ASIDE" are properly recalled in the order in which they have been "stood aside," and the accused is not thereby deprived of any right, nor does he suffer any injury. (Commonwealth v. Eisenhower, 670.)

5. MURDER—SEPARATION OF JURY—PRESUMPTION—REBUTTAL.—In cases of conviction of murder, the separation of the jurors further than is necessarily required to enable them to perform their duties as such, and under the care of a sworn officer, creates a presumption of improper influence, but this presumption may be rebutted by the prosecution by clear and convincing proof. (*Commonwealth v. Eisenhower*, 670.)

6. NONSUIT FOR FAILURE OF PROOF—WHEN PROPER.—A nonsuit is not erroneous where the plaintiff fails to prove the cause of action alleged in his declaration, but proves a different cause of action, and no motion is made to change the declaration. (*Case v. Central R. R. Co.*, 617.)

7. A NONSUIT cannot be granted because of mere variance between the plaintiff's complaint and the evidence of his witnesses. (*Wassermann v. Sloss*, 209.)

8. JURY TRIAL.—AN INSTRUCTION THAT THE WORDS "DIRECT AND PROXIMATE CAUSE" mean a cause which naturally led to, and might have been expected to be instrumental in producing, the result complained of, and that if they find the failure to awaken the plaintiff so as to give her reasonable time to dress herself before the train in which she had a berth had reached her station, and the treatment which she received therefrom was the cause which, under the proof, led naturally to, and which might have been expected to be directly instrumental in producing, the injury which they find the plaintiff had sustained, then that they might find the defendant answerable for such injury, is substantially correct. If the defendant wished the instruction more definite and certain in any respect, it should have requested the desired modification. (*McKeon v. Chicago etc. Ry. Co.*, 910.)

9. JURY TRIAL, HARMLESS ERROR IN REFUSING INSTRUCTIONS.—A refusal of the court, on a trial for libel, to instruct the jury that if the article published was a fair and accurate account of the remarks made by the person to whom they were attributed, this may be considered in mitigation of damages, is not erroneous, if the plaintiff had waived all claim for punitive damages, and the jury had been so instructed. (*Buskstaff v. Hicks*, 853.)

10. JURY TRIAL.—A special verdict is not designed to elicit from the jury mere evidentiary facts or an abstract of the evidence, and a court does not err in refusing to submit questions to the jury for the purpose of securing its finding respecting facts of that character (*McKeon v. Chicago etc. Ry. Co.*, 910.)

See Appeal; Criminal Law, 2; Damages, 3; Instructions.

TRUSTS.

1. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTE—DUE PROCESS OF LAW.—The Pennsylvania statute of April 18, 1853, section 2, authorizing the court to decree a sale when property is held in trust, and one or more persons required to consent unreasonably withhold consent, is not unconstitutional as taking property without due process of law. It does not defeat or interfere with the individual rights of property different from or further than any other mode of changing the rights of joint owners to severalty or regulating the management until that is done. (*Freeman's Estate*, 659.)

2. TRUSTS—POWER TO SELL PROPERTY.—Power conferred upon a court by statute to decree a sale of property held in trust, when one or more persons required to consent unreasonably withhold consent, is properly exercised in a case of a lease of such property for a long term, which the trustees, empowered to lease without the consent of the cestuis que trust, treat as a sale for the purposes of the trust requiring the consent of such cestuis que trust to a sale of the trust property. (*Freeman's Estate*, 659.)

3. TRUSTS—POWER TO SELL PROPERTY.—Power conferred by statute upon a court to decree a sale, when property is held in trust and one or more persons required to consent unreasonably withhold consent, extends to a lease which is properly treated as a sale, and will double the net revenue of the property at once, with an increase in the future, and increase the value of the property by reason of improvements which the lessee is required to make. (Freeman's Estate, 659.)

See Banks and Banking, 2, 3; Execution, 5, 6.

ULTRA VIRES.

See Corporations, 4.

USURY.

1. USURY.—AN ANTEDATED NOTE is not necessarily usurious. To make it so facts must be pleaded to show that it was antedated with intent to avoid the law of usury. (Ansley v. Bank of Piedmont, 122.)

2. USURY, RETAINING BENEFIT OF COMMISSIONS.—If a lender receives the full amount of interest which the law permits, and his agent exacts a commission of the borrower for securing the loan, and divides it with the lender, the transaction is usurious, and a trust deed given to secure the loan is, by the laws of Georgia, void at the option of the borrower; his title cannot be divested by the exercise of the power of sale given in such deed. (Pottle v. Lowe, 246.)

See Powers.

VACCINATION.

See Boards of Health, 5, 6; Schools, 1, 2.

VARIANCE.

See Indictment.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—BREACH OF CONTRACT TO CONVEY—DAMAGES.—Upon the breach of a contract to convey real estate, with warranty of title, nominal damages only can be recovered, where such breach is owing to the vendor's failure of title. (Gerbert v. Trustees, 578.)

2. VENDOR AND PURCHASER—CONTRACT TO SELL LAND—RESCISSION.—To avoid a contract for the sale of land on the ground of false representations, the purchaser must offer to rescind promptly upon the discovery of the fraud, and the failure to do so for a reasonable length of time after such discovery raises a presumption of acquiescence in its validity. (Ansley v. Bank of Piedmont, 122.)

3. VENDOR AND PURCHASER—CONTRACT FOR SALE—FAUDULENT REPRESENTATIONS.—In a court of law, the purchaser of land cannot resist the payment of the purchase money on the ground of fraud and misrepresentation of the vendor, so long as the former remains in possession and refuses to surrender, and a plea seeking to avoid payment on such grounds, but failing to aver surrender of possession or some sufficient reason for not doing so is fatally defective. (Ansley v. Bank of Piedmont, 122.)

4. FORFEITURE, WAIVER OF.—If the vendor of land on which the purchaser or his wife has filed a homestead, by his acts or statements, leads her to believe that he will not insist upon the strict terms of the contract of sale as to payments, he will not afterward be permitted to insist that a forfeiture has occurred by reason

of the payments not being made at the time agreed upon. (*Lessell v. Goodman*, 435.)

5. **VENDOR AND PURCHASER—FAILURE OF TITLE—DAMAGES—IMPROVEMENTS.**—If there is a contract by a landlord to convey to a tenant unimproved land, with warranty of title, and the vendee, before conveyance is to be made, erects buildings upon it, without the request of the vendor, their value cannot be recovered by the vendee, where the vendor's title fails, and an action is brought to recover damages for the breach of the contract. (*Gerbert v. Trustees*, 578.)

6. **ONE IS NOT A PURCHASER FOR A VALUABLE CONSIDERATION** without notice unless he paid the purchase money and acquired a legal title before he had notice of the equity of his adversary. (*Peay v. Seigler*, 731.)

7. **STATUTE OF FRAUDS.—IT IS NOT NECESSARY THAT BOTH PARTIES SIGN** the contract or memorandum necessary to satisfy the statute of frauds. It is sufficient, in a suit or cross-bill against the vendor of land for specific performance, to show that he signed the contract of sale, for the vendee becomes bound thereby and renders the contract mutual when he brings suit for specific performance, or takes possession of the property under his contract. (*Peay v. Seigler*, 731.)

8. **STATUTE OF FRAUDS—PAROL EVIDENCE TO SUPPLY DEFECTS IN MEMORANDUM.**—Whenever the writings relied upon show that both parties referred to the same property, parol evidence is admissible for the purpose of designating the particular place both had reference to, and, if it is described as the land of the vendor at L., parol evidence is admissible to prove what land he had there, and, if he had but one parcel, that must have been the one referred to by both parties. (*Peay v. Seigler*, 731.)

9. **STATUTE OF FRAUDS—PART PERFORMANCE.**—Though a contract for the sale of land is oral, yet if the purchaser makes partial payments, and under and in pursuance of the contract enters into possession of the property, these acts constitute such part performance of the contract as take it out of the statute of frauds. If the sale is made by an agent, his authority to place the purchaser in possession is established by a letter from the vendor authorizing him to make the sale and suggesting that the property is in possession of a renter whose lease had expired, and that if the sale is made, the agent is authorized to request such renter to vacate at once. (*Peay v. Seigler*, 731.)

10. **STATUTE OF FRAUDS.—LETTERS AND RECEIPTS** though neither are of themselves sufficient, may together make such a memorandum as will satisfy the statute of frauds. Hence, if the owner of land requests another by letter to sell his place at L. on terms stated in the letter, and the agent thus constituted replies that he cannot sell on those terms, but can sell on other terms, which he states, to which the owner replies that he will accept the terms named, one hundred dollars in cash and the same amount each year for three years with interest at eight per cent per annum, and the agent thereupon notifies the purchaser that his offer has been accepted and receives from him his first payment and gives a receipt therefor to him, the letters and the receipt constitute a valid and enforceable contract. (*Peay v. Seigler*, 731.)

VERDICT.

See Appeal, 9.

WAIVER.

See Agency, 8, 9; Insurance, 43, 44; Sales, 5; Vendor and Purchaser, 4.

WATERS AND WATERCOURSES.

1. SPRINGS OF WATER ARE OF TWO CLASSES, those which are fed by the seeping of water generally through the surrounding earth, and those which are formed by the breaking out upon the surface of a definite underground watercourse. The latter are governed by the same rules of law as surface streams. (*Metcalf v. Nelson*, 746.)

2. SPRINGS OF WATER, PRESUMPTION AS TO CHARACTER OF.—It will be presumed, in the absence of evidence, that a spring is formed and fed by percolating waters, rather than by the outbreak upon the surface of the earth of a subterranean stream. (*Metcalf v. Nelson*, 746.)

3. SPRINGS, PROPERTY IN WATERS OF.—The owner of land upon which a percolating stream appears is entitled to the waters thereof, and may recover damages from a person seeking to carry them away. (*Metcalf v. Nelson*, 746.)

See Damages, 1; Real Property, 1.

WILLS.

1. WILLS, UNJUST OR CAPRICIOUS.—If a person has testamentary capacity, his will cannot be avoided on the ground that it is unjust or capricious. (*In re Kaufman*, 179.)

2. WILLS.—THE UNDUE INFLUENCE which will invalidate a will must be such as operates upon the mind of a testator at the time of making the will, and must be an influence relating to the will itself. (*In re Kaufman*, 179.)

3. WILLS, UNDUE INFLUENCE, EVIDENCE SUFFICIENT TO PROVE.—Unless there is evidence tending to prove some fraud practiced upon the testator, or that some physical or moral coercion was employed such as to destroy his free agency, the court should not submit to the jury the question whether undue influence had been used. (*In re Kaufman*, 179.)

4. WILLS—STATEMENTS OF TESTATOR, WHEN NOT COMPETENT TO IMPEACH.—Statements made by a testator after its execution to the effect that he did not make the will and did not know what was in it, that he wanted to give a particular heir as much as the others, and did not feel safe if he made another will, are not admissible to impeach his will. (*In re Kaufman*, 179.)

5. WILLS—EVIDENCE OF FINANCIAL STANDING OF HEIRS.—In a contest of a will by which one of the heirs of a testator was disinherited, it is not proper to admit evidence of the wealth of the heirs who are preferred by the decedent as compared with the wealth of the heir omitted from the will. (*In re Kaufman*, 179.)

6. WILLS—ADMISSION OF IMPROPER EVIDENCE ON CONTEST OF.—When the validity of a will is contested on the ground of undue influence, the court cannot be too careful in excluding from the consideration of the jury incompetent and irrelevant evidence. Such evidence, if once admitted, may produce an effect which cannot be effaced by subsequent instructions. (*In re Kaufman*, 179.)

See Charities; Devise.

WITNESSES.

1. WITNESSES—IMPEACHMENT—PRIOR TESTIMONY.—The evidence of a witness taken on a prior examination may be used to contradict his subsequent evidence, when his attention is called to his prior testimony before his later examination, and the stenographer who took the first testimony testifies that he took it correctly.

reduced it to writing, and that he can, and by a reference to his notes does, state such testimony as given. (Klotz v. James, 848.)

2. EXPERT EVIDENCE.—MEDICAL EXPERTS who heard the plaintiff give a part of her testimony and had the balance of it read to them by the court reporter may testify what, in their opinion, was the cause of a miscarriage suffered by her. (McKeon v. Chicago etc. Ry. Co., 910.)

3. EXPERT EVIDENCE.—IF HYPOTHETICAL QUESTIONS ARE ASKED EXPERTS, purporting to state facts testified to by other witnesses, and no material misstatements or omissions are pointed out in such questions, there is no error in permitting the witnesses to answer them, though some immaterial fact may have been omitted from the interrogatories. (Kliegel v. Altken, 901.)

4. EVIDENCE—FRAUD—CROSS-EXAMINATION.—If, in an action to recover attached property under a claim of purchase before attachment, the original owner gives evidence tending to show good faith in the sale, it is proper to allow full cross-examination on all the circumstances bearing on good faith. (Klotz v. James, 848.)

See Trial, 2, 3.

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